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AIR TRAFFIC FORECASTING FOR THE NEW YORK-NEW JERSEY PORT DISTRICT*

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ON June 30, 1950, The Port of New York Authority completed an air traffic forecast projecting for the next thirty years the volume of commercial air passengers, cargo, and mail, both domestic and foreign. The projection of air traffic was undertaken to assure that the rehabilitation and expansion of the terminal airports in the New York-Northeastern New Jersey Metropolitan Area would be adequate to serve traffic needs and at the same time represent financially sound development.

Purpose of the Air Traffic Forecast

The Forecast, which required almost a year and a half to complete, is the basis for the Port Authority's program for developing terminal type airport facilities for the New Jersey-New York Port. It is the cornerstone for the long range budget and for the planning of all facilities with respect to both size and the scheduling of construction.

Most of the magnitudes required for planning purposes are directly dependent on air traffic volumes, as for example:

1. The number of aircraft movements for which runways, aprons, and parking areas and hangar facilities must be provided depends essentially on the volume of traffic, passengers, cargo and mail.
2. The size of terminal buildings, parking lots, and access highways depends on the number of airline passengers and the volume of visitors and spectators attracted to the airport.
3. The volume of cargo will determine not only the amount of cargo handling space needed but also the extent to which all-

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cargo aircraft are used for freight service; and, therefore the need for separate cargo terminal facilities on the airport.

The Port Authority is committed to a policy of revenue development and management that will result in economic self-sufficiency for the four terminal type airports it operates in the New York Port Area. Since it acquired La Guardia and New York International Airports from New York City under 50 year leases in June 1947 and Newark Airport from the City of Newark under similar long-term lease arrangements in March, 1948, the Port Authority has pioneered in the application of established business practices to the problems of airport management.

An essential management tool in the case of airport operation, where long-term capital commitments up to 50 years are required, is a financial program for 10 to 15 years ahead. Such a summary of estimated revenues and expenditures includes a capital program which places a dollar sign on the "master" plan and thereby determines its economic feasibility. Obviously, a long-range capital program must be considered only as a guide or possible course of action and not as a final decision to construct. Each project in the current year's budget must be subjected to a detailed analysis as to its operational and economic feasibility based on the latest available data. Thus some projects will later be discarded; others may be added. In order to have an up-to-date long-range program that reflects considered judgment of new factors not previously anticipated, the financial program will be revised every three to five years, or more frequently if conditions warrant. Part of this revision will be a reexamination of the long-range traffic forecast. A long-range traffic forecast can be useful only to the extent that it is kept up to date. The Port Authority has a program of traffic analysis that will make it possible to revise the forecast when events require.[1] The estimates were made on a basis permitting periodic review of their component parts and providing a method of revision in the light of changing developments

Methodology of Forecast

Because air transportation is only one means of transporting persons and property, attainment of the objectives of the forecast requires consideration not only of air transportation and the special problems of the New Jersey-New York Metropolitan Area, but also of all intercity transportation (surface and air) in the nation as a whole. In

[1] Specific examples of such contingencies would be government subsidization of an air merchant marine devoted primarily to cargo carriage or the advent of power units using atomic energy. Certain general assumptions were made where imponderables prevented adequate analysis and valid findings. It was assumed that the national economy would continue to expand during the next three decades, that in spite of cyclical business fluctuations there would be no depression comparable to the 1930's, that the American economy would remain predominantly private enterprise, that the dominant role of the United States in world affairs will result in expanding volume of international trade and travel, that there would not be another large-scale war, and that commercial air transportation will continue to benefit from government expenditures and promotional activities in the field of aviation.

order to estimate what part of the total surface/air market could reasonably be forecast for air transport, equal attention had to be devoted to the competitive relationships between surface and air transport. Adherence to the basic concept that air transportation volumes could not be forecast without consideration of other modes of transport required that the forecast of air traffic volumes be made in three steps:

1. Forecast of the total surface/air market for the nation as a whole.
2. Division of the national forecast among the competing modes of transport.
3. Estimate of the portion of the national air traffic volume that would be handled at New York and Newark airports.

There were several reasons for selecting this method:

1. The growth of traffic volumes for a particular city will depend as in the case of the nation as a whole, on the growth of income and population. The future well-being of a separate city may be considered as resulting from:
   a. Improvement in economic well-being of the entire country.
   b. Special local conditions which result in a rate of growth below or above the national average.
2. Even if it were methodologically desirable to ignore national aspects of transportation, it would not be feasible to do so. A forecast which attempted to estimate directly the volume of local traffic would be confronted with an almost complete lack of adequate local data. Neither trends nor relationships among economic and transportation magnitudes could be determined from available local data.
3. The resulting forecast gives a comprehensive picture of transportation showing the relationship of the components to the total. Since air transportation is only one of the components, the reasonableness of the air forecast has been checked against the forecast for surface transport. This forced detailed consideration of the impact of air transport on the surface carriers and pointed up the fact that overoptimism with respect to air transport is equivalent to overpessimism with respect to surface transportation. In effect, air transportation was placed in its proper prospective within the entire transportation picture.
4. The effect of making the forecast in a series of steps has been to increase the reliability of the air estimates by introducing the possibility of cancellation of compensating errors.
5. By considering first the forecast of total surface/air traffic, so-called "created" traffic (traffic that would not have existed except for the superior speed of air transportation) has been included in the forecast in a simple, logical manner. This avoided the problem of attempting to estimate a quantity that could not be given a precise definition and for which there are no data showing magnitude.

The forecast represents a synthesis of estimates derived from five different approaches to forecasting.

1. *National Income Approach.* Estimates of future traffic volumes were obtained by (1) estimating the total population and national

income for the periods under consideration; (2) determining the historic relationships between national income, population, and transportation; and (3) applying these historic relationships to the projections of population and national income, with adjustments to compensate for expectable changes in these relationships during the forecast periods.

2. *Traffic Trend Approach.* Through the Traffic Trend Approach, estimates are made by determining the historic trends in traffic volumes and projecting these trends through the forecast periods. Trend projections, although largely statistical in nature, were modified to allow for new factors that will alter the patterns of the past.

3. *Traffic Pattern Approach.* This method concerns itself primarily with actual patterns of traffic such as the length of haul, direction and frequency of movement, and weight and value of shipment which characterize various classes of traffic moving by competing carriers. In the present inquiry, length of haul—whether the traffic be passenger, cargo, or mail—assumed a most important position because of the advantage aircraft possess in serving long-haul, as contrasted with their equally clear disadvantage in serving short-haul traffic.

4. *Market Approach.* The Market Approach looks at the transportation problem from the point of view of the user of transportation services. By this approach it is possible to identify those travelers and shippers who are substantial or frequent users of air transport services and by analysis of the traffic patterns and habits of each group in relationship to probable future air transportation rates and services determine their future potential as users of air transportation. The forecast used not only market survey data already available but conducted both a national travel survey and one for the New Jersey-New York Metropolitan Area.

5. *The Technological Service Approach.* The choice of methods of travel or carriage of goods will be greatly influenced by the relative rates and services which the airlines can offer in competition with surfaces modes of transport. It was necessary, therefore, to estimate the capacity of air transport to improve its service relative to surface carriers, and to determine the ability of air transportation to reduce rates to levels more in line with those of competitors. Improvements in these service characteristics—dependability, safety, frequency, comfort, cost, and speed—are a direct function of technology. Hence it was necessary to ascertain the important technological changes which are likely to be achieved during the forecast period. This was done through a comparative analysis of all existing aircraft and power plants as well as those in the planning stage based on an extensive survey of both airframe and power plant manufacturers.

In many respects, these five approaches to forecasting traffic volumes represent different methodological approaches to the problem of estimating future traffic. Thus, it was possible to expose projections obtained through the use of one method to the results of other methods, thereby enhancing the reliability of the final results. Moreover, only by using several methods was it possible to take into account all of the important variables affecting future transportation volumes. From a strictly methodological point of view, it would have been preferable if these several methods could have given estimates completely independ-

ent of each other. However, because of the inter-relationship of all economic activity, there is necessarily an overlapping of these several methods.[2]

Forecast of Population and National Income

Because of the primary importance of population and national income in determining the size of the market for transportation services, considerable study was devoted to forecasting these elements.

There are 19 million more persons in this country now than there were only ten years ago. This rapid increase, following a decade of depression during which less than half as many people were added to the population, was not anticipated by students of population growth. As a result, even relatively recent population forecasts have proved to be in substantial error, or are subject to wide disagreement among authorities. The most probable future attainments in the thirty years ahead, has appeared to be an increase of somewhat over 11 million per decade.

A forecast of future national income was arrived at through a study of labor force and productivity trends to obtain per capita income estimates, then through use of the population projection, total national income was forecast for the years ahead.

1. *Labor Force.* The proportion of the people making up the nation's labor force will be influenced in the future by a number of opposing factors. Tending to decrease the number of persons seeking employment will be earlier retirement and expanded opportunities for higher education, while the influx of women into the labor force and the growing popularity of part-time employment will have an opposite effect. It has been concluded that the net effect of these conditions wil not alter appreciably the historic relationship between the population as a whole and the size of the labor force. About two out of every five persons in the country will be at work or seeking work.

2. *Productivity.* How much productive effort the population will account for depends not only on how many people work, but on how much and how effectively they work. The volume of goods and services produced by a given amount of effort has continued to increase throughout the history of the nation with advancing science and technology, development of better business organization, application of improved methods of distribution, and introduction of more efficient credit and banking facilities. Output per man-hour of work increased by fully a third during the period from 1929 to 1941. Available data indicate that this rate of increase in productivity, averaging some two and one-half per cent per year, was probably also achieved over the preceding thirty years.

[2] For example, the national income approach emphasizes the level of national income as a determinent of the volume of transportation use. The traffic trend approach, although not explicitly using the relationship between transportation volumes and national income, nevertheless involves the projection of past traffic trends which in turn have been affected by past levels of national income. Further, it should be appreciated that while population and national income trends have been projected on a theoretically independent basis, estimates of population have been predicated on the concept of a generally expanding volume of national income.

Governmental policies, to a large and increasing degree, will influence and control the extent to which technological innovation can be translated into increased productivity. Such policies may be both beneficial and harmful.[3] For the purpose of this study, a two per cent annual increase in man-hour productivity has been assumed over the entire period to 1980. By 1965 the nation will be producing twice as much goods and services per unit of labor as in 1940, and by 1980 another one-third increase in productivity will be accomplished.[4]

3. *Length of Workweek.* As a result of these productivity trends, it has been possible to progress from an average workday of 12 hours to one of 8 hours, and from a 6 to a 5 day week in many industries. After 1965 it is believed that 35 hours will represent the average length of the workweek for industrial employees, and that the paid vacation will be practically universal.

4. *Estimate of National Income.* The composite of these factors indicates that national income will increase from approximately 220 billion dollars a year at the present time to about 416 billion dollars in 1980. This will mean achievement of a national income approximately 88 per cent greater than today. Expressed in per capita terms, national income in 1980 will average $2,239 for every person in the country compared with the present per capita average of $1,477. In terms of actual goods and services enjoyed, each individual, on the average, will be fully 50 per cent better off than he is today.

Domestic Air Passenger Travel

The total volume of intercity travel during the past two decades has been determined largely by two factors, (1) the high productivity of the American economy and (2) the nation's unparalleled expansion of automobile ownership and use. These factors will continue to be the dominant ones influencing travel volumes during the coming decades, with the airplane gradually assuming a more important role.

Changes in the level of national income during the past two decades have been paralleled by fluctuations in the volume of intercity travel. As national income declined from 1929 to 1932, intercity passenger miles decreased by 17 per cent. In 1940, national income recovered substantially from the depression lows accompanied by a 57 per cent increase in intercity passenger miles. By 1949, intercity travel reached almost 170 billion passenger miles representing an increase of 42 per cent over the 1940 prewar peak and corresponding to a 60 per cent increase in national income.

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[3] Government contributions to scientific research, conservation of natural resources, and social security legislation are examples of programs that can be beneficial. On the other hand, governmental subsidies, price controls, military outlays, and extreme progressive income taxes are illustrative of policies that can reduce the real income of the nation.

[4] The estimate of increasing productivity, averaging two per cent per year, is not the mere projection of past trends. The world's fund of scientific knowledge awaiting development is sufficient to sustain a high rate of productivity increase for many years. The application of nuclear energy to peace-time uses, although the most spectacular, is only one example of many developments which will result from the practical application of existing scientific information.

Intercity per capita travel of 1,131 miles in 1949 exceeded the 1929 figure by 378 miles. Much of this increase must be credited to the expanding use of the automobile. Of the net gain of 378 miles, the automobile accounted for 66 per cent, motor bus 22 per cent and commercial air transport 12 per cent. Railroads declined two miles per capita.

National Income and the Total Intercity Travel

Total intercity travel tends to increase at a slower rate than national income but faster than population. This relationship between per capita income and per capita travel may be seen from the data in Table 1. For example, per capita intercity travel increased by 48 per cent from 1933 to 1940 compared with an 80 per cent increase in per capita income and a 5 per cent increase in population. This characteristic of transportation growth in relationship to national income and population has its basis in consumer expenditure patterns. These show that the percentage of income spent for travel declines with increases in income. The data for the period of 1929-49 exclusive of the war years falls into a definite pattern which provides a basis for extrapolating the volume of per capita travel in relation to per capita income and thus provides a basis for forecasting national intercity passenger miles.

TABLE 1—NATIONAL INCOME AND TOTAL INTERCITY PASSENGER TRAVEL, 1933-1980

	Per Capita National Income		*Per Capita Intercity Passenger Travel*		*Total Intercity Passenger Miles (Millions)*
Year	1935-1939 *Dollars*	*Per Cent Increase Over* 1933	*Passenger Miles*	*Per Cent Increase Over* 1933	
1933	$ 341.6	...%	610.5	...%	76,680
1937	556.7	63.0	840.5	37.7	108,261
1940	614.4	79.9	906.1	48.4	119,605
1949	866.7	153.7	1,130.9	85.2	169,642
1950	867.8	154.0	1,100.0	80.2	167,200
1965	1,020.0	198.6	1,250.0	104.8	212,500
1980	1,324.2	287.6	1,350.0	121.1	251,100

Forecast of Automobile and Common Carrier Traffic

The estimates of automobile and common carrier traffic reflect the dominant position obtained by the private automobile during the late twenties and thirties. Over the course of the past several decades, the common carriers have been relegated to a secondary role in the intercity travel market. By the late thirties almost 75 per cent of all intercity travel was by private automobile. The common carriers will not regain their former position during the next 30 years. But it is significant also that future contraction of common carrier traffic is not anticipated. Stabilization of the present relationship between the common carrier market and that of the private automobile will be brought

about as the potentialities of the airplane are more fully realized. Travel by both common carrier and automobile will expand with the growth of population and national income.

Service Characteristics of the Common Carriers

In the division of the total intercity common carrier market among rail, bus, and air, particular weight was given to an evaluation of those individual service characteristics which have in the past and which will continue in the future to determine the nature and extent of shifts in travel volume as among competing carriers. These are the characteristics which establish the value of the service to the user and guide his selection of a particular type of carrier.

The more important of these service characteristics are dependability, safety, frequency, comfort, cost, and speed. Air transportation currently has an advantage only in speed and schedule frequency. Though air's relative position in speed and frequency will continue to improve, the greatest opportunities for strengthening its competitive position rest with advances in dependability and safety, and in reductions in fares. Marked improvements can be expected of air transportation in each of these characteristics while rail and bus transportation have reached a stage of mature devolopment where only limited improvement can be expected.

1. *Dependability of Operation*—The postwar period has witnessed the first general reduction in airport minimum landing requirements since such minimums were first established in 1937. Installation of instrument landing systems has made possible halving minimum requirements from a 400 foot to a 200 foot ceiling and from 1 mile to ½ mile visibility. The CAA program for installation of high-frequency omnidirectional ranges, precision approach radar, high-intensity approach lights, and distance measuring equipment should make approaches and landings possible with 100 foot ceilings and visibility of ¼ mile. Completion of the entire air navigational program of the Radio Technical Committee for Aeronautics, projected for about 1965 should see scheduled dependability freed from the vagaries of weather.

2. *Safety of Operation*—Safety statistics for 1949 indicate 1.3 passenger fatalities per 100 million domestic passenger miles for air as compared with less than 0.1 fatalities for railroads. Marked improvement in airline safety has been recorded over the course of the past twenty years, resulting in air travelers being accepted as normal risks by the nation's insurance companies. Nevertheless, recognition of the apparent greater safety of rail travel over air travel by the traveling public and inevitable front page reporting of most air accidents have been major deterrents to more widespread acceptance of air travel.

Technological development pertaining to air carrier operation may be expected to produce continuing improvement in the safety of airline operations. Airframes will become more sturdy, engines and power plants will improve in dependability, the human factor will become less important, and navigational devices and airway and airport practices will become more reliable.[5] The continuing improvement in safety anticipated during the next thirty years from these combined advances will substantially lessen air transportation's present competitive disadvantage.

3. *Frequency of Service*—Air transport will conform to the pattern of bus operation of high frequency of service with relatively small capacity as compared with the seating capacity of a ten-car streamliner coach train of nearly 500 seats. Air service already compares on a favorable basis at many large metropolitan centers as far as frequency is concerned. Although such advantage can be expected to increase as travel volume grows, this future increase will not be materially important in attracting additional patronage to the airlines.

4. *Personal Comfort*—The trend toward larger aircraft and the coming application of turbine and jet power plants assures smoother riding qualities. Air sickness will become a less serious problem and improvements in ventilation, pressurization, and noise control will enhance air transport's competitive position. On the other hand, aircraft seating accommodations are not expected to approach those provided by the railroads, a disadvantage offset to a large extent by the reduction in travel time as compared with surface travel.

5. *Competitive Fares*—Reductions in costs made possible by continuing innovations in aircraft design, power plant and navigational equipment, together with higher density seating arrangements will make possible air fares comparable to rail coach, but not as low as bus fares.

6. *Speed of Service*—The introduction of turbo-prop and turbo-jet aircraft will make possible speeds in excess of 500 miles per hour compared with current cruising speeds in the neighborhood of 300 miles per hour and 180 miles at the end of the war.

Because of appreciable time savings, air transportation has already captured a large part of the long-haul market. The adoption of turbo-prop and jet power to commercial airliners will have the effect of further increasing the advantage that air transportation already has in the long distance travel market. Because of this speed advantage, together with anticipated reductions in fares and increased safety and dependability, virtually all long-haul common carrier passenger traffic will be

[5] Both the aircraft manufacturers and the airlines are giving increasing attention to the structural strength of aircraft so as to reduce casualties in the event of accident.

moving by air within the period of this forecast. However, the increased speed of aircraft limits air transportation's ability to servicing the long and medium-haul travel market and virtually excludes it from the short-haul market under 150 miles.

On trips under 150 miles, the speed advantage is minimized to the point where it almost vanishes. Past trends in aircraft design have featured larger and faster aircraft. In consequence, the majority of air terminals are situated at or beyond the perimeter of the cities they serve. This has resulted in surface travel time between airports and downtown sections that often dissipates the time savings made possible by aircraft speed. Although the helicopter may alleviate the problem of relative inaccessibility of airports, it is anticipated that air penetration of short-haul travel will lag far behind penetration of the long-haul market.[6]

Traffic Characteristics of the Common Carrier Market

The division of the common carrier market among rail, bus, and air carriers has undergone significant changes during the past several decades. Rail travel has been declining relative to total common carrier travel for many years and it is anticipated that this trend will continue. The railroads transported 78 per cent of common carrier passenger mile travel in 1929, about 61 per cent in 1940, and after a high level of operations during the war, declined further to 51 per cent in 1949.

The motor bus share of common carrier travel, on the other hand, increased from 22 per cent in 1929 to 34 per cent in 1941 and to 37 per cent in 1949. Bus passenger miles increased from 6.8 billion in 1929 to 13.6 billion in 1941 and to 21.5 billion in 1949. The growth of bus patronage, mainly short-haul, has occurred to a considerable extent at the expense of the railroads.

The airplane was not a major factor in the common carrier travel market prior to the war. Only three per cent of common carrier travel used this new mode of transport in 1940. In 1949, however, air transport captured over 11 per cent of the market and flew 6.6 billion passenger miles. Air travel in the past has been largely first-class so that air transport and the rail carriers could be considered as competing for the combined pullman/air market. This is no longer true, and the first-class portion of air travel will become decreasingly important as coach services are further expanded.

Air transportation will remain highly competitive with rail but only to a minor degree with the bus because of its short-haul nature. Accordingly, the future growth of air transportation depends largely

[6] Forecast does not include intercity helicopter traffic since forecast was concerned with traffic to be handled at Port of New York Airports and intercity helicopter service would operate from downtown airports.

on its ability to compete for the combined rail/air market. In addition to the shifts that have occurred in the division of the common carrier market among rail, bus and air, two additional characteristics of rail/air movements are of particular significance to the future growth of air transportation.

1. *Length of Trip*—For the country as a whole, data compiled by the carriers indicate an increase of about 50 per cent in the average length of rail trip over the past two decades, while for air travel the increase exceeded 100 per cent.[7] Although figures for 1929-49 indicate that part of the increases resulted from conditions peculiar to the war years, the postwar decline appears to have been arrested at a level appreciably above the immediate prewar years. This is shown in the following table.

TABLE 2—AVERAGE LENGTH OF PASSENGER TRIP FOR RAIL AND AIR CARRIERS, 1930-1949

	Miles	
Year	*Rail*	*Air*
1930	76	221
1935	77	415
1940	88	375
1945	151	511
1949	120	468

Examination of the mileage pattern for individual cities reveals that the increasing average length of trip represents a shifting of the rail/air pattern from the mileage brackets under 500 miles to those in excess of 1000 miles. The following table shows the 1940 and 1947 rail/air mileage distribution for the metropolitan travel market[8] and similar figures for three individual metropolitan districts.

TABLE 3—MILEAGE DISTRIBUTION OF RAIL/AIR TRAVEL, 1940 AND 1947

Mileage	*Metropolitan Travel Market*		*N. Y./Newark*		*Dallas*		*Washington*	
Interval	1940	1947	1940	1947	1940	1947	1940	1947
0- 150	10.0%	8.1%	13.3%	10.9%	1.4%	1.0%	10.1%	8.8%
151- 500	35.8	31.8	30.7	27.1	25.7	23.0	49.4	45.6
501-1000	25.7	24.2	31.6	28.8	42.0	37.2	24.6	24.2
1001-2000	13.4	17.3	10.8	15.8	30.4	37.7	9.1	10.8
Over 2000	15.1	18.6	13.6	17.4	0.5	1.1	6.8	10.6
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

[7] Average length of passenger trip has been derived by dividing revenue passenger miles by number of revenue passengers as reported by the carriers to the appropriate federal regulatory agency. Differences in reporting practices over the course of the years such as varying numbers of reporting carriers, varying methods of treating interline and connecting traffic, and varying methods of computing interstation distances have caused some non-comparability of data.

[8] The metropolitan market, as used herein, represents travel among 17 selected major metropolitan districts and between each of the 17 and 38 other selected districts throughout the nation. This metropolitan market accounts for 43 per cent of total rail/air travel and 68 per cent of air travel. The 55 cities included account for 40 per cent of the national population.

The significance of this changing rail/air patern is twofold. First it indicates a shift of short-haul travel from rail to the bus and automobile. Second, it involves the development of an increasingly large proportion of long-haul common carrier travel.

2. *Air Penetration of the Rail/Air Market*—Air penetration increases rapidly with length of trip. In 1947 the metropolitan travel market showed less than 3 per cent air penetration in travel under 150 miles compared with 48 per cent beyond 1000 miles. This same pattern was evident in 1940. Although individual cities show variations from the metropolitan market, the stability of the pattern is clearly evident.

Between 1940 and 1947 the increase in penetration has been greatest in the mileage brackets above 500 miles. The degree of air penetration for travel beyond 1000 miles increased from 18 to 48 per cent or almost threefold compared with only a twofold increase for travel under 500 miles.

TABLE 4—AIR PENETRATION OF THE RAIL/AIR TRAVEL MARKET*
1940 AND 1947

Mileage Interval	*Metropolitan Travel Market*		*N. Y./Newark*		*Dallas*		*Washington*	
	1940	1947	1940	1947	1940	1947	1940	1947
0- 150	1.4%	2.6%	0.7%	0.8%	3.6%	11.0%	1.5%	1.4%
151- 500	9.5	19.0	10.0	17.0	15.9	35.0	13.2	19.0
501-1000	11.3	25.5	10.8	20.7	16.7	36.6	14.0	27.0
1001-2000	20.1	51.9	26.9	61.7	40.9	67.2	28.6	52.4
Over 2000	16.6	44.7	21.2	48.9	30.7	79.0	37.9	65.3
Average	11.6%	29.7%	12.4%	28.9%	23.8%	48.0%	15.3%	27.9%

* Air Traffic derived from records of scheduled airlines. Traffic of the irregular carriers not included.

Forecast of Air, Rail, and Bus Travel

Travel in excess of 1000 miles, which now constitutes about 35 per cent of rail/air travel of the metropolitan market, will increase to 40 per cent by 1965 and to nearly 50 per cent by 1980. The shift in the travel pattern for the remainder of the country, however, will not be as marked as for this metropolitan market.

The percentage of long distance common carrior travel accommodated by air transport will continue to increase. By 1965 virtually all rail/air travel of the metropolitan market beyond 1000 miles will be by air. By 1980, air penetration will reach 75 per cent in the 500-1000 mile bracket and 50 per cent between 150 and 500 miles. For the remainder of the country, which generates proportionately less long-haul travel, it is believed that air penetration will average only about one-half that attained in the metropolitan travel market.

The forecasts in Table 5 for air, rail, and bus indicate that air transportation will attain over 35 per cent of the common carrier market by 1980. In terms of growth over the next thirty years, air travel

will increase 239 per cent and bus travel 10 per cent, while rail travel will decrease 42 per cent.

TABLE 5—ESTIMATE OF INTERCITY COMMON CARRIER TRAVEL, 1950-1980

(Millions of Passenger Miles)

Year	*Total Common Carrier*	*Rail*	*Air*	*Bus*
1949 (Actual)	57,600	29,500	6,600	21,500
1950	53,960	25,906	7,300	20,754
1965	57,120	19,843	16,707	20,570
1980	63,054	17,000	22,353	23,701
Per cent Change 1980 over 1949	+9.5%	—42.4%	+238.7%	+10.2%

NEW YORK DOMESTIC AIR PASSENGER TRAFFIC

The ability of the New York-Newark area to maintain its dominant position in the intercity air transport market rests upon the stability of its economic structure and upon the development of untapped air markets.

The economic character of the New York-Northeastern New Jersey Metropolitan District and of most of the other major districts within the United States has not changed materially during the past several decades, and is not likely to be altered significantly during the next thirty years. The presence of unexploited air markets has been confirmed through intensive examination of the integral parts of the New Jersey-New York District's total travel market.

Stability of the New York-Northeastern New Jersey Market

Stability of transportation patterns is the cornerstone of traffic forecasting. Without a high degree of constancy in the primary elements of traffic, there is no basis for forecasting. Such stability does exist. Moreover, the constancy of transportation patterns can be traced directly to stability of municipal economic characteristics.

1. *Stability of Economic Structure*—The basic economic structure [9] of the Metropolitan District of New York and Northeastern

[9] Municipal communities may be classified objectively into four economic groups:

Distribution Center: A community which draws its economic strength primarily from wholesale trade and distribution.

Industrial Area: A community which is predominantly manufacturing in character.

Balanced City: A community which possesses wholesaling and manufacturing activities in about equal proportion.

Institutional Place: A community which is primarily a center for other types of activities such as recreation, education, government, finance, or insurance.

For further information, see Airport Planning Pamphlet, Economic Character of Communities, published by Civil Aeronautics Administraton, November, 1948.

New Jersey has been unchanged for many years. The area has handled between 40 and 50 per cent of the nation's dollar value of foreign trade for the past fifty years. It has been the nation's largest Distribution Center for over a century. More than 25 per cent of the nation's wholesale sales are made in this one District. Services related to finance and business management are unexcelled. The New Jersey-New York District's position as the nation's number one distribution, banking, and management center will be maintained. Other major Distribution Centers such as Atlanta, Dallas, Minneapolis, Kansas City, and San Francisco have displayed similar permanence in basic economic structure. Cities whose major economic activity is manufacturing exhibit the same stability of economic structure as do Distribution Centers. Pittsburgh, Detroit, Lowell, Scranton, Akron, and Youngstown have been outstanding Industrial Areas for generations.[10]

2. *Stability of Air Traffic in Relation to Economic Structure*—Distribution Centers are good air travel cities. Analysis of the traffic at 90 metropolitan districts and 123 additional cities discloses that of the four economic types, Distribution Centers as a class have always accounted for the highest per capita air travel. Institutional Places are a close second, Balanced Cities third. The air travel of Industrial Areas is, almost without exception, in fourth place. The following table shows the relative air traffic generating ability of major metropolitan districts.

TABLE 6—AIR PASSENGERS PER 10,000 POPULATION AT MAJOR METROPOLITAN DISTRICTS 1939-1948

*Economic Group**	1939	1940	1941	1947	1948
Distribution	710	1011	1521	6660	6170
Institutional	471	643	1257	5749	5142
Balanced	422	549	759	2485	2430
Industrial	199	362	548	1483	1430
Average of Major Metropolitan Districts	511	754	1087	4571	4410

	Deviation from Average				
	1939	1940	1941	1947	1948
Distribution	+38.9%	+34.1%	+39.9%	+45.7%	+39.9%
Institutional	— 7.8	—14.7	+15.6	+25.8	+16.6
Balanced	—17.4	—27.2	—30.2	—45.6	—44.9
Industrial	—61.1	—52.0	—49.6	—67.6	—67.6

* Includes air passenger traffic originated and terminated at all of the major metropolitan districts of the United States with population of over 250,000 except the Lowell-Lawrence-Haverhill District where comparable air service was not available in all the selected time periods.

[10] Air Traffic Generation in the New York Metropolitan District, a monograph prepared for the Port of New York Authority by Grahame H. Aldrich, February, 1949.

Since the ability of any city to generate air traffic is inherently linked to its economic structure, and because of the demonstrated constancy of these economic groups, there is assurance that each city will retain its relative traffic position. A good traffic city can be expected to remain such. The full import of the stability or constancy of the air traffic economic group relationships can now be made aparent. Data for the nine major Distribution Centers of the United States reveal no significant shifts in the ranking of individual cities over a span of almost ten years.

TABLE 7—AIR PASSENGER TRAFFIC AT MAJOR DISTRIBUTION CENTERS
(Number of Passengers and Rank)
1940-1947-1948

Metropolitan District	*Number of Passengers* Sept. 1940	Sept. 1947	Sept. 1948	*Rank* Sept. 1940	Sept. 1947	Sept. 1948
New York-Newark	76,800	294,400	301,900	1	1	1
San Francisco	13,100	95,700	81,700	2	2	2
Kansas City	6,500	37,200	30,800	3	4	5
Seattle	6,500	46,700	38,400	4	3	3
Dallas	6,100	37,100	37,600	5	5	4
Minneapolis	6,100	34,100	28,900	6	6	7
Atlanta	5,700	31,400	30,700	7	7	6
Memphis	2,600	16,700	15,900	8	8	8
Omaha	2,200	12,100	11,100	9	9	9

3. *Stability of New York-Northeastern New Jersey Transportation Pattern*—The New York-Northeastern New Jersey mileage pattern is another factor in the stability of traffic movement to and from this area in that its rail/air travel market has always been one of short trips. More than 95 per cent of its combined rail and air passengers in 1933 moved at distances less than 500 miles. By 1948 this percentage had decreased only slightly to 93 per cent. In total, the New Jersey-New York District rail/air pattern shows but a minor shift towards the higher mileage brackets.

TABLE 8—DISTRIBUTION OF NEW YORK-NORTHEASTERN NEW JERSEY RAIL/AIR PASSENGERS ACCORDING TO LENGTH OF TRIP
1933 and 1948

Length of Trip (Miles)	*Percentage Distribution* 1933	1948
Under 150	78.0%	70.0%
151- 500	17.2	22.8
501-1000	3.6	4.6
1001-2000	0.7	1.8
Over 2000	0.5	0.8
Total	100.0%	100.0%

The factors underlying this Region's present travel pattern limit the extent to which a shift to longer trips will occur. In many respects the New York-New Jersey District pattern is similar to other metropolitan areas in the northeastern part of the United States and these, in turn, are different from most cities in the remainder of the country. The railroad data in Table 9 illustrate this important transportation characteristic.

TABLE 9—DISTRIBUTION OF RAIL PASSENGERS OF SELECTED CITIES ACCORDING TO LENGTH OF TRIP
1933

	Percentage Distribution				
	Northeastern Sector			*Other Large Cities*	
Length of Trip (Miles)	*New York-Newark**	*Philadelphia*	*Boston*	*Los Angeles**	*Chicago**
Under 150	82.7%	96.0%	75.4%	15.4%	36.9%
151- 500	12.1	2.5	20.8	49.0	42.5
501-1000	4.0	1.2	1.4	4.8	16.0
1001-2000	0.8	0.2	2.0	11.5	3.1
Over 2000	0.4	0.1	0.4	19.3	1.5
Total	100.0%	100.0%	100.0%	100.0%	100.0%

* Travel via Electric Railways is excluded from the above table and, to that extent, movements in the Under 150-Mile bracket are understated. Data for Los Angeles omit traffic by the Pacific Electric Railway, while data for Chicago do not include traffic of the Chicago, North Shore and Milwaukee; Chicago, South Shore and South Bend; and Chicago, Aurora and Elgin railroads. In addition, data for the New York Region exclude traffic carried by the Long Island Railroad.

The reason for the similarity in the travel pattern of most cities in northeastern United States is twofold: (1) The cities are relatively close to each other and to New York, the transportation hub of the area; (2) Most of the cities in this area are Industrial or Balanced Cities which characteristically have a short-haul travel market.

The New York Rail/Air Travel Market

The ability of the New Jersey-New York Port Area to maintain its dominance of the intercity air travel market rests not only upon the stability of the underlying economic factors but also upon the development of potential air markets. To a large extent the development of these markets awaits the improved service and lower fares which are anticipated during the period of this Forecast.

In order to permit a more detailed study of developing trends, the rail/air travel market of New York-Newark can be divided into four subclassifications and analyzed through the application of market research techniques. Significantly, data obtained by such methods reveal that two-thirds of air transportation traffic now comes from a single group—*visiting business travelers.*

TABLE 10—DISTRIBUTION OF THE NEW YORK-NORTHEASTERN NEW JERSEY PASSENGER MARKET ACCORDING TO RESIDENCE AND PURPOSE OF TRIP

(Based on Rail and Air Trips over 150 Miles)

1948

Purpose of Trip	*Percentage Distribution* *Rail and Air Passengers*	*Air Passengers*	*Rail Passengers*	*Air Penetration of Rail/Air Travel*
Business Travel				
Non-Resident	28.2%	66.0%	13.7%	65%
Resident	19.0	12.8	21.4	19
Total	47.2%	78.8%	45.1%	46%
Personal Travel				
Resident	30.5%	15.5%	36.3%	14%
Non-Resident	22.3	5.7	28.6	7
Total	52.8%	21.2%	64.9%	11%
All New York-Northeastern New Jersey Travel	100.0%	100.0%	100.0%	28%

Although considerable business travel remains as a potential for air services, the future growth of air transport will depend primarily on penetration of the relatively untouched personal travel market. In particular, that part of the resident pleasure travel market involving trips over 1000 miles represents a prime market for air transport development. This market alone represents 45 per cent of the region's rail/air travel over 1000 miles with only one-quarter of these long-haul passengers using air service. The rapid expansion of air coach services during recent years is tangible evidence of the air market for personal travel at lower fares. Significantly, surveys of air coach passengers reveal that two-thirds of these passengers are traveling for personal reasons as compared with only one-third of regular fare passengers.[11]

Combining the estimated potentials from these four travel groups, it is found that business travel by air can be expected to increase 70 per cent by 1980 while pleasure travel will increase more than 450 per cent. Table 11 shows the composition of the New Jersey-New York air travel market today and for 1980.

TABLE 11—NEW YORK-NORTHEASTERN NEW JERSEY AIR PASSENGER TRAFFIC BY MARKET GROUP

(Based on Rail and Air Trips over 150 Miles)

1948 and 1980

Year	*Passengers (Thousands)* *Total*	*Business*	*Personal*	*Percentage Distribution* *Business*	*Personal*
1948 (Act'l)	3,857	3,040	817	78.8%	21.2%
1980	9,757	5,199	4,558	53.3	46.7
% Increase 1980/1948	153.0%	71.0%	457.9%		

[11] Domestic Sky-Coach Survey, Civil Aeronautics Board, April-May, 1949.

Estimate of New York-Newark Domestic Air Passenger Traffic

Since the maintenance of the New York-Newark area's position in the intercity air transport market is founded on its stable economic structure and upon the existence of untapped air markets awaiting development, the national rate of growth of air passenger travel becomes a logical base for the estimation of New York and Newark's future air traffic. Economic factors applicable to this Metropolitan Area and to the principal cities with which it exchanges traffic also were considered in the determination of the final forecast. The resultant estimate indicates an increase of 160 per cent by 1980, only slightly less than the forecasted national increase of 166 per cent. This is shown in Table 12.

TABLE 12—ESTIMATE OF NEW YORK-NEWARK DOMESTIC AIR PASSENGER TRAFFIC

(Thousands of Passengers)
1950-1980

Year	*U.S. Total**	*New York-Newark*** *(In & Out)*
1949 (Actual)	14,859	3,904
1950	15,532	4,150
1965	28,805	7,404
1980	39,563	10,136
Per Cent Increase 1980/1949	166.3%	159.6%

* The national passenger forecast is derived from the national passenger mile forecast.

** New York-Newark air traffic includes passengers originating or terminating their trips at, and through passengers arriving at and departing from, the three major airports in the District—La Guardia, Newark, and New York International—as reported to the Port Authority by the individual carriers.

OVERSEAS AIR PASSENGERS

More than half of all United States international sea and air passengers pass through the New Jersey-New York Port District. Most of this Port of New York travel moves to and from Europe, but the Americas constitute a secondary market of considerable importance. Only minor amounts of traffic are exchanged with points in Africa, Asia, and the Pacific. The following tabulation shows the Port of New York's share of the nation's total international travel by market area.[12]

[12] International air passenger traffic includes that moving to and from all points outside the United States except that over land borders, to and from Canada and Mexico, and that to and from the insular territories of the United States such as Puerto Rico.

TABLE 13—U.S. INTERNATIONAL PASSENGER TRAFFIC BY MARKET AREA
(Number of Passengers)
1949

Market Area	*U.S. Total*	*Port of New York*	
		Total	*% of U.S.*
Europe	843,446	775,056	91.9%
Asia	88,615	14,661	16.5
Pacific	33,551	510	1.5
Africa	13,240	10,119	76.4
North America	660,588	110,826	16.8
Central America	89,118	19,650	22.0
South America	135,871	60,801	44.8
Total All Areas	1,864,429	991,623	53.2%

Although more than half of the nation's international passengers passed through the Port of New York during 1947-1949, about 53 per cent in 1949, this share is not as high as in the past. During the 5-year period 1931-1935, the New York Port District's share exceeded 75 per cent and fluctuated between 64 and 74 per cent during the subsequent 5-year period, 1936-1940.

The diminished Port of New York share can be laid primarily to the changing status of Europe and to the increasing importance of travel between the United States and other countries. Intercontinental overwater movements have exhibited a relative decline which cannot be discounted as a wartime phenomenon. Canadian and Mexican travel, conversely, have shown substantial growth and sustained ability to hold their gains.

Travel to and from Europe reached its peak in the years just prior to World War I. Most of these trips were due directly to immigration from Europe and to related journeys by first and second generation Americans returning or receiving visits of friends and relatives. The declining number and increasing age of the European foreign-born population of this country will continue to exert a retarding influence on further expansion of travel between the United States and Europe.

It is significant, however, that 45 per cent of all international passenger movements still are concentrated between the United States and Europe. An additional 35 per cent of the total is exchanged with offshore points in North America, primarily Bermuda, Cuba, and the nearby Caribbean Islands. The future course of the European travel market will determine in large measure the future volume of travel clearing through New York.

International Travel Through the New Jersey-New York Port District

Air transport itself has contributed to the Port of New York's recent decline in importance as an international travel center. Such a paradox is traceable to the operational characteristics of the airplane and of the air routes which it flies. Twenty years ago, commercial air

routes to European and Latin American destinations were virtually nonexistent. There were no international airports to compare with today's Washington, Miami, Tampa, New Orleans, or Houston airports. Vessel departures to Europe and South America were concentrated, as they are today, at the Port of New York. Thus, the individual who desired passage to any of the principal overseas areas had little choice but to take his journey through this port.

The development of commercial aircraft has expanded United States gateway facilities, particularly for individuals wishing transportation to areas in Latin America. To illustrate, a resident of Chicago may currently go to Buenos Aires by air through the Port of New York, Miami, Tampa, New Orleans, Dallas, San Antonio, or Houston. In 1931, the same person would undoubtedly have used rail to New York and cleared by ship to Buenos Aires.

The unfavorable impact of multiple international air gateways upon air passenger traffic in the New York-Northeastern New Jersey District cannot be avoided, nor can it be characterized as a temporary condition. Passengers from the interior of the United States can generally be expected to move directly to the gateway nearest their destination. On the other hand, the Port of New York's location is a distinct advantage in maintaining its position as the key port for travel to and from Europe.

With the further recovery of trans-Atlantic travel and the introduction into service of aircraft overflying the southern gateways, the New York share of total international traffic will increase gradually to 65 per cent by 1965. The forecast of total United States international travel by sea and air and New York's share of this traffic is shown in the following table.

TABLE 14—FORECAST OF INTERNATIONAL PASSENGER MOVEMENTS
(Thousands of Passengers)
1950-1980

Fiscal Year	*Total U.S.*	*Port of New York*
1949 (Actual)	1,864	992
1950	2,072	1,347
1965	2,417	1,571
1980	2,770	1,801
Per Cent Increase 1980 over 1949	48.6%	81.6%

Changing Trends in Service Characteristics of Aircraft in International Operation

International aviation services currently hold a decided advantage over marine transport in the factors of speed and frequency of scheduled services. The technological development of international air transport, which will parallel similar developments for aircraft used

in domestic service, will greatly improve the competitive position of the air carriers.

The steamship, however, will remain popular for overseas pleasure travel. It is a hotel and recreation center as well as a means of transportation. Moreover, it is expected that improvements in steamship travel will be confined largely to additional passenger comfort accommodations. The shipping industry will continue experimentation with types of service designed primarily to attract a broader segment of the public traveling for pleasure. This is a continuation of a trend which started in the thirties.

From a small beginning in the Caribbean area in the early thirties, when air transport obtained about one per cent of the international travel market, gradual development produced almost six per cent air penetration by 1939. During the war, as much as two-thirds of international travel used air transport. The percentage of air penetration diminished considerably by 1949, but more than half of this travel still moves by air.

Concentration of shipping services at the Port of New York will keep the New York-Northeastern New Jersey air penetration of international passenger travel below that attained for the nation as a whole. However, continuing improvement in air transport services will give air transportation an increasing share of the total market. The percentage of international passengers using air carriers out of the Port of New York is expected to reach 50 per cent by 1970 and 55 per cent by 1980.

The New York Port Area overseas forecast for the period 1950-1980 is given below.

TABLE 15—FORECAST OF OVERSEAS AIR PASSENGER TRAFFIC TO BE HANDLED AT THE PORT OF NEW YORK *
1950-1980

Fiscal Year	*Passengers (Thousands)*
1949 (Actual)	437
1950	553
1965	810
1980	1,084
Per Cent Increase 1980 over 1949	148.1%

* Includes insular traffic.

(To Be Continued†)

†Part II will present forecast for domestic and overseas air cargo, express and mail.

THE MEANING OF "INCIDENTAL TO TRANSPORTATION BY AIRCRAFT" AS USED IN SECTION 203 (b) (7a) OF THE INTERSTATE COMMERCE ACT

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WHEN the Civil Aeronautics Act was enacted in 1938, numerous other statutes related to air transportation were repealed or amended by Section 1107 of that Act.[1] Among such amendments was subsection (j):

> "Section 203(b) of the Motor Carrier Act, 1935, is amended by inserting after the words '(7) Motor vehicles used exclusively in the distribution of newspapers' a semicolon and the following: '*or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft*'."

The significance of this amendment is not apparent without reference to Section 203 (b) of the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act).[2] Section 203 (b) is the "exemption" section which relieves the several types of motor carriers therein specified from all provisions of the Interstate Commerce Act except those relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment. Thus, a motor carrier falling within the exemption of Section 203 (b) is not subject to economic regulation by the Commission, that is to say, such a motor carrier is not required to procure a certificate of public convenience and necessity or an operating permit from the Commission and its rates are not subject to control by the Commission. The effect of Section 1107 (j) of the Civil Aeronautics Act was thus to place in this exempt category "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

The phrase "when incidental to transportation by aircraft" is not defined, or otherwise qualified or explained, either in the Civil Aero-

[1] 52 Stat. 1027, 49 U.S.C. 677.
[2] Part II, Interstate Commerce Act, 49 Stat. 543, 49 U.S.C. 303.

nautics Act or the Interstate Commerce Act, nor has diligent research by numerous persons revealed any legislative history which might throw light upon the Congressional intent with respect to the scope of this phrase. Moreover, at the time Section 1107 (j) of the Civil Aeronautics Act was enacted, there was no comparable provision either in that Act or in the Interstate Commerce Act from which the meaning of that phrase could be construed by analogy. Thus, Congress in effect employed a novel statutory expression without offering any clues as to its precise meaning, notwithstanding the fact that an important exemption was thereby created for a class of motor carriers of rapidly increasing significance.

The purpose of Section 203 (b) (7a) is, of course, obvious. Air transportation, unlike other forms of transportation, is seldom, if ever, complete in and of itself. Other forms of transportation generally have their terminals in the heart of the city or town served; but most airline terminals, i.e., airports, are located at considerable distances from the centers of the cities and towns which they are designed to serve. This occurs not only because airports, particularly those accommodating the larger commercial aircraft, require extensive tracts of land which can only be procured at reasonable prices in rural or suburban areas, but also because the inherent nature of commercial air transportation precludes frequent short interval stops by the airplanes, with the result that airports are often so located as to serve with reasonable convenience several separate communities. Inevitable gaps are thus created between the actual origin and destination points of air travelers and air shipments and the places where the airplanes are available; and motor carriers, operating either under contract with the airlines or independently, are the usual means of filling these unavoidable gaps in a complete air transportation service. Under Title IV of the Civil Aeronautics Act, Congress gave to the Civil Aeronautics Board complete jurisdiction over all economic phases of common carrier air transportation; but under Part II of the Interstate Commerce Act, in the absence of the aforementioned amendment to Section 203 (b) (7a), the Commission retained jurisdiction over these "incidental" motor carrier services so essential to a commercial air transportation system. Congress apparently recognized the undesirability of this duality of regulation and acted accordingly. Thus, as stated by the Civil Aeronautics Board in a case involving this question: [3]

> "Section 1107(j) amends the Motor Carrier Act to exclude from the regulatory provisions of that Act motor vehicle operations which are 'incidental to transportation by aircraft.' It is apparent that it was deemed necessary to avoid conflict of jurisdiction between the Board and the Interstate Commerce Commission."

The general purpose of the exemption created by Section 203 (b) (7a) is thus clear enough, but the precise scope to be given that exemption is far less certain. The exemption is, of course, a limitation

[3] *Railway Express Agency Grandfather Certificate*, 2 CAB 531 at 538.

on the scope of the Interstate Commerce Act, and as such, the primary responsibility for the interpretation of such exemption rests with the Commission; and such interpretation, if reasonable, will not be disturbed by the Courts except for weighty reasons.[4]

The applicability of the exemption in Section 203 (b) (7a) has been considered by the Commission in at least eighteen reported cases and several unreported cases. These cases fall into the following three distinct categories, each of which has been treated somewhat differently by the Commission: (1) cases concerned with the air express traffic of the Railway Express Agency, all of which were decided during the period 1940-1942; (2) cases involving the transportation of commercial airline traffic by motor carriers operating under contracts with the airlines, the first decision in this category having been made in 1947; and (3) cases involving the transportation of commercial airline traffic by motor carriers operating independently of the airlines, the initial decision in this category also having been made in 1947.

I. The Railway Express Cases

This discussion commences with the R.E.A. cases, not because they are first in significance, but because they are first in time and have thereby created an unnecessary amount of confused thinking. The R.E.A. cases are, in fact, utterly without value as precedent for the airline traffic cases, and in all probability may be regarded as over-ruled by the Commission even with respect to R.E.A. traffic.

"Air Express" is an expedited service of the R.E.A. Air express traffic moves on R.E.A. bills of lading and is accepted from shippers and delivered to consignees only by the R.E.A. The commercial airlines are utilized by the R.E.A. under contract to move such traffic between airports, but the R.E.A. is the carrier insofar as the public is concerned. Air express traffic moves at substantially higher rates than "air freight" and is given a priority in handling by the airlines. When air express moves by aircraft, it necessarily must be transported to or from the airport by motor carrier. At some points such motor carrier service is provided by the R.E.A. itself, while at other points the service is provided by motor carriers under contract with the R.E.A.

In the first case involving Section 203 (b) (7a)[5] a motor carrier, under contract with the R.E.A. to transport air express between Columbus and the airport serving Columbus (Port Columbus), applied to the Commission for a contract carrier permit covering such operation. The Commission, without analyzing Section 203 (b) (7a), held such service to be within the exemption and dismissed the application.

During the years 1941 and 1942 the Commission decided four cases in which the R.E.A. applied for authority to transport express by its

[4] *Brewster v. Gage*, 280 US 335 at 336.

[5] *Port Columbus Cab Co.—Contract Carrier Application*, 24 MCC 237.

motor vehicles between points formerly served by railroads.[6] In each of these cases the Commission found that the public convenience and necessity required the proposed service, limited however, to shipments moving on a through bill of lading and having an immediately prior or subsequent movement *by rail,* and directed that a certificate in such form be issued to R.E.A. As an apparent afterthought, R.E.A. requested that the words "or air" be added to the certificate following the words "by rail," to cover the occasional movement of an air express shipment, and the Commission complied. In each of these cases the Commission adverted to the exemption in Section 203 (b) (7a) but held that it was not applicable, even though in the *West Warwick Case* a distance of only twelve miles was involved. In none of these cases, however, did the Commission make any effort to define the phrase "incidental to transportation by aircraft" or to explain why it regarded the proposed R.E.A. service for air express as a "line-haul" movement. Commissioner Lee dissented on this point in the *West Warwick Case* and in the *Bristol Case,* contending in both that the service proposed, insofar as air express shipments were involved, was within the exemption of Section 203 (b) (7a), but he likewise gave no reasons for his position. Since only a trivial amount of air express traffic was involved in these cases, and the Commission had already decided that a certificate should be issued to the R.E.A. for the proposed service covering rail express, the slight modification of the certificate to include air express, as requested by the R.E.A., must have appeared to the majority of the Commission as a harmless accommodation to R.E.A., particularly in the absence of opposition by any party.

The foregoing considerations would appear to accord these R.E.A. cases little, if any, precedent value with respect to the meaning and scope of the exemption in Section 203 (b) (7a). In any event, the Commission in its subsequent decisions has utterly disregarded them. In the first case decided by the Commission involving Section 203 (b) (7a) subsequent to the R.E.A. cases,[7] the Commission adverted to the *West Warwick Case,* but dismissed it with the statement that "the circumstances which persuaded such a finding at that time are not present here." A slight effort was made in that case to distinguish the *West Warwick Case* on its facts; but in the fourteen or more cases subsequently decided by the Commission, involving Section 203 (b) (7a), the R.E.A. cases were not even mentioned. Thus, the R.E.A. cases should properly be disregarded as precedent reflecting on the scope of Section 203 (b) (7a).

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[6] *Railway Express Agency, Inc., Extension of Operations—West Warwick, R.I.,* 31 MCC 332; *-West Unity-Middletown,* 31 MCC 363; *-Providence-Bristol,* 31 MCC 385; and *-Clarksburg-Buckhannon.* 31 MCC 700.

[7] *Sky Freight Delivery Service, Inc., Common Carrier Application,* No. MC-106028, 47 MCC 229 (1947).

II. Cases Involving Commercial Airline Traffic Transported by Motor Carriers Under Contract with the Airlines

Three types of commercial airline traffic are presently being transported by motor carriers under contract with the airlines: (1) at virtually every airport in the United States served by the commercial airlines under their "air freight" tariffs, motor transportation service for air freight is offered by the airlines between such airport and points within the designated "terminal area" of that airport; (2) under emergency circumstances all commercial airlines provide a substitute motor carrier service for air service for all types of their traffic; and (3) at five airports in the United States the commercial airlines under their tariffs provide ground transportation for passengers between such airports and one or more points within the "terminal areas" of those airports. No cases have ever arisen before the Commission involving the type of service described in (3), but in several cases the Commission has considered the applicability of the exemption in Section 203 (b) (7a) to the types of service described in (1) and (2).

Motor Carrier Transportation as Regular Part of Airline Air Freight Operations

All of the permanently certificated domestic airlines of the United States are presently engaged in the transportation of "air freight." Although airlines have long been transporting property by air in conjunction with Railway Express Agency's air express service, the direct entry of airlines into the freight transportation field is essentially a postwar development, the first airline tariff offering to the public a common carrier air freight service having been published on October 1, 1944.

In conjunction with the establishment of their air freight service, the airlines recognized that adequate and efficient ground transportation service, coordinated with the air service, was essential if air freight service was to be an effective instrumentality of commerce; and the following statement by the Commission indicates that it is in complete accord with the airlines on this point: [8]

> "The sale of air-line service depends to a considerable extent upon the speed with which the lines are able to effect deliveries. Any delay necessitated by the assembly or distribution of traffic by ground transportation will naturally affect the time element involved in the over-all service. In some instances, the time consumed in the movement of traffic by ground transportation will closely approach, if not exceed, the time consumed in the line-haul air movement. It is necessary, therefore, that the airlines have available an expeditious motor-carrier service which will be available at all times to meet arriving or departing planes, so that a minimum of time may be lost between the original pickup or ultimate delivery."

[8] *Peoples Express Co., Extension of Operation*, No. MC-1756 (Sub. No. 1), 48 MCC 393 at 395.

Accordingly, each airline engaging in air freight activities has undertaken to provide ground transportation service between the airports served and designated points within the "terminal areas" of those airports, through contracts with local motor carrier operators. The air freight shipment moves from the door of the consignor to the door of the consignee under the airline's airbill (bill of lading). The trucker accepts and delivers such shipments solely as the agent of the airline; and the airline is responsible to the shipper for any loss or damage.[9]

In the *Sky Freight Delivery Service Case* [10] the Commission faced, for the first time, the question of the extent to which a motor carrier, transporting air freight under contract with an airline, was operating within the exemption provision of Section 203 (b) (7a). The Commission summarily dismissed the Railway Express Agency cases as possible precedents, and quite properly approached the *Sky Freight Case* as one of first impression.

The applicant in the *Sky Freight Case* requested a certificate of public convenience and necessity to transport shipments moving on commercial airline or air express bills of lading between the airports in the New York-Newark area, on the one hand, and points in New York and northern New Jersey, on the other hand. The opinion of the Commission contained the following findings of fact. The service was being provided exclusively for American Airlines under a contract with that airline. The motor carrier acted solely as agent for the airline and performed in the name of the airline. The shipments at all times moved under the airbill (bill of lading) of the airline. The service was provided between La Guardia and Newark airports, on the one hand, and all points within the "air freight terminal area" of the airline as set forth in its tariffs, on the other hand. Five points in New York and twenty-three points in New Jersey were included within such "air freight terminal area," the most distant point in New York being twenty-three miles from La Guardia Airport and the most distant point in New Jersey being eight miles from Newark Airport. The contract also provided for an expansion by the airline of such "terminal area" to include points within forty-five miles of La Guardia Airport and twenty-seven miles of Newark Airport.

The Commission first considered the meaning of the phrase "incidental to transportation by aircraft" as used in Section 203 (b) (7a). Although general consideration had been given to that section by the Commission in the R.E.A. cases, it had never previously undertaken to define that particular phrase. Legislative history unfortunately could offer no assistance, since Congress had not disclosed its intent or pur-

[9] In May 1947, the airlines delegated to their wholly owned subsidiary, Air Cargo, Inc., complete authority to act as their agent in arranging for, and supervising the operation of, such ground transportation service.

[10] *Supra* note 7.

pose in adding Section 203 (b) (7a) to the Act. Consequently, the Commission elected to follow the dictionary definition of "incidental" and concluded that, to be "incidental," the motor carrier transportation must be a "result of," and "adjunct of," and "subordinate to" the movement by air. In support of this conclusion, the Commission referred to Sections 202 (c) (1) and (2),[10a] which were added to the Act two years after Section 203 (b) (7a). In those sections Congress again used the phrase "incidental," when referring to motor carrier service rendered in conjunction with transportation by other forms of carriers, but was more specific, in that the term "incidental" was limited expressly to pickup, delivery, and transfer service within the terminal areas of the line-haul carriers. The Commission, in the *Sky Freight Case,* indicated that the language in Section 202 (c) could probably be regarded as a more artistic expression by Congress of the same general concept it intended to convey in Section 203 (b) (7a). From the dictionary definition of "incidental" and the analogous, although later, use of that term in Section 202 (c), the Commission drew the following conclusion:

> ". . . transportation in the performance of collection, delivery, or interline transfer of air freight within what appears to be a reasonable terminal area for the line-haul air carrier is 'incidental' to the transportation by air."

The Commission dismissed the application of Sky Freight upon making the ultimate finding that the service proposed was within the scope of the exemption provided in Section 203 (b) (7a) as thus defined. It should be noted in passing, however, that this definition does not necessarily purport to be all-inclusive. Collection, delivery, and transfer services within the airline's terminal area are held to be "incidental to transportation by aircraft"; but the definition does not indicate that the Commission intended thereby to exclude the possi-

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[10a] "(c) Notwithstanding any provision of this section or of section 303, the provisions of this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to chapter 1 of this title, or by a water carrier subject to chapter 12 of this title, or by a freight forwarder subject to chapter 13 of this title, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title when performed by such carrier by railroad, as transportation subject to chapter 12 of this title when performed by such water carrier, and as transportation or service subject to chapter 13 of this title when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental." 56 Stat. 300, 49 U.S.C. 302.

bility that other types of service may also be "incidental to transportation by aircraft" within the meaning of that phrase as used in Section 203 (b) (7a). Thus, for example, cases involving the "emergency" type of service, discussed in the following subsection, were decided subsequent to the *Sky Freight Case;* and even though such service extended far beyond the terminal area of the airport concerned, it was held by the Commission to be "incidental" within the meaning of the exemption.

In the second case presented to the Commission involving the transportation of air freight by a motor carrier under contract with airlines, again the application was for authority to provide motor transportation for property moving on airline bills of lading between La Guardia and Newark airports, on the one hand, and points in northern New Jersey, within forty miles of the Newark Airport, on the other.[11] Except for the fact that the contractual arrangements with the airlines were oral, rather than written, the facts of the *Golembiewski Case* were virtually identical to those in the *Sky Freight Case,* and the Commission so stated:

> "The application before us is almost identical to that filed by Sky Freight, supra. The maximum hauls involved in the Sky Freight Case were approximately the same as those here proposed. In that case, as here, shipments transported move in door-to-door service at rates fixed by the airlines and under contracts between applicants and the airlines. We find nothing in applicant's present proposal to compel us to a different conclusion than was reached in the Sky Freight Case."[12]

The Commission qualified its decision, however, by saying:

> "Such consideration as door-to-door rates and air-carrier billing and responsibility are not necessarily controlling and would not require a finding of an exempt operation should it appear that the motor-carrier service involved was so extensive as to constitute, in fact, a line-haul part of a through interline service, rather than a bona fide collection or delivery service incidental to air carrier service."[13]

This admonition in the *Golembiewski* opinion soon found practical application in the next case of this type to be decided by the Commission, *Peoples Express Co., Extension of Operation.*[14] The nature of the service proposed in the *Peoples Express Case* was found to be substantially the same as that proposed in the two preceding cases: the application was limited to shipments moving on commercial airline or air express bills of lading, the service was to be rendered for airlines under contract, door-to-door airline rates would apply to the shipments, and they would be covered throughout their movement by the airline

[11] *Sigmund J. Golembiewski, Common Carrier Application,* No. MC-106850, 48 MCC 1 (1948).

[12] 48 MCC 1 at 4.

[13] 48 MCC 1 at 5.

[14] *Supra* note 8.

shipping document. The only distinguishing feature between the *Peoples Express Case* and the two preceding cases was that the proposed service was to be provided between the airports in or adjacent to New York and Newark, on the one hand, and *all* points in the entire State of New Jersey, on the other hand.

On the issue of the applicability of Section 203 (b) (7a) to this proposed service, the Commission concluded that service within such portion of the area involved as duplicated the *Sky Freight* proposal would be within the exemption; but it went on to point out that certain of the points to be served were more than one hundred miles distant from the Newark Airport and actually were in the immediate vicinity of the Philadelphia Airport at which the same type of air service was available. Based on such findings the Commission reached the following important conclusion:

> "Motor operations conducted as those proposed which extend so far as to reach into the territory adjacent to, and served primarily by, another airport clearly take on the character of inter-terminal line-haul service in *substitution for, rather than incidental to, air* transportation." (Emphasis added.)[15]

The Commission found that the public convenience and necessity required the service proposed in the *Peoples Express* application; and rather than attempting to draw a line between that portion which was exempt under Section 203 (b) (7a) and that which was not, the Commission decided to issue a certificate for the entire operation.

The *Peoples Express Case* decision thus provides a significant corollary to the definition of "incidental to transportation by aircraft" in the *Sky Freight Case,* by establishing an important category of service which will *not* be regarded as service within "a reasonable terminal area for the line-haul air carrier" and hence exempt under Section 203 (b) (7a), namely, motor carrier service which extends into the terminal area of another airport at which like air service is available.

The other two cases of this type decided by the Commission are the *Harry Lillien Case*[16] and the *Hazel Kenny Case.*[17] The former is an unreported case involving a motor carrier providing transportation of property in the New York and nearby Connecticut area for the Belgian airline, Sabena, under contract with that airline. The service was held to be within the exemption in Section 203 (b) (7a) on the authority of the *Sky Freight Case.* The latter case involved an application for a certificate of public convenience and necessity by a motor carrier providing pickup and delivery service for air freight in the Pittsburgh area under contract with Capital Airlines. The application requested authority to provide such service to all points within a fifty-mile radius of the airports in Allegheny County (Pittsburgh), although at that

[15] 48 MCC 393 at 396.
[16] *Harry Lillien, Common Carrier Application,* No. MC-108665, unreported.
[17] *Hazel Kenny Extension—Air Freight,* No. MC-5485 (Sub. No. 1), 49 MCC 182 (1949).

time (and at present) Capital Airlines and the other airlines serving Pittsburgh were (and are) providing pickup and delivery service under their tariffs only within Pittsburgh and its immediately adjacent suburbs. In analyzing the area within the fifty-mile radius contemplated for service by the Kenny application, the Commission stated:

> "Within this radius Pittsburgh is the largest point in size and within Pittsburgh and a small area therearound is concentrated the greatest density of population for such radius. The radius also embraces some mountainous territory within which principal air terminals are not likely to be located. Shippers on the perimeter of the radius are desirous of air service. That they seek an expeditious movement of their traffic by air is evident from their practice of not engaging line-haul motor carriers to transport their freight to and from the airports. Because of this the air carriers are handicapped in attracting more freight from these points when they do not have an agent to perform the incidental ground haul. We conclude that points within a 50-mile radius of either of the two above-described airports in Allegheny County are within the terminal areas of air carriers operating to and from such airports, and that bona fide collection, delivery, and transfer operations on behalf of air carriers serving such airports in the transportation of commodities having an immediately prior or subsequent movement by aircraft *and moving on commercial air line or air express bills of lading* are incidental to transportation by aircraft and are exempt from the certificate and permit requirements of the act."[18]

Based on such findings, the Commission dismissed the application. On its face the *Kenny* decision would appear to be the broadest interpretation to date by the Commission with respect to the scope of the Section 203 (b) (7a) exemption. Actually, however, such is not the case. It should be noted that the Commission qualified its decision in the *Kenny Case* by providing that *such traffic must be moving on commercial airline or express bills of lading.* Since an airline or air express bill of lading may be issued only in conformance with a tariff published by the airline or the Railway Express Agency and filed with the Civil Aeronautics Board, and no such tariff had been so filed, the Commission was not in fact authorizing Kenny to provide the proposed service within the fifty-mile radius contemplated by the application. In effect, the Commission merely held that if a commercial airline should publish a tariff providing pickup and delivery service to points fifty miles distant from the Pittsburgh airport and should contract with Kenny to perform the actual operation for the airline, such operation by Kenny would then be within the exemption.

The qualification that shipments must be "moving on commercial airline or air express bills of lading" appears in every decision of the Commission in which it has held that ground service provided for air freight by motor carriers under contract with the airlines is within the exemption of Section 203 (b) (7a). The significance of this qualification may not be readily apparent; but what it in effect represents is a

[18] 49 MCC 182 at 185.

reliance by the Commission upon the fact that air freight moving in motor carrier service under airline bills of lading must necessarily be moving under the airline tariffs and under airline contracts with the motor carriers, and such movements cannot take place without the sanction of the Civil Aeronautics Board.[19] Thus, the Commission in these cases is actually saying that if such movement is approved by the Civil Aeronautics Board it will be approved by the Commission.

The Commission, in deciding the foregoing cases, has unquestionably exercised sound administrative judgment and acted in a manner consistent with the apparent intent of Congress by according almost conclusive weight to those very factors which place such motor transportation squarely under the jurisdiction of the Civil Aeronautics Board, namely, that such services are provided pursuant to contracts between the airlines and the motor carriers and the fact that such services are offered to the public as services of the airlines under their tariffs, shipping documents, and responsibility. Although the Commission, of course, has the primary duty of construing the scope of the exemption in Section 203 (b) (7a), the serious repercussions of such interpretations are felt mainly by the air transport industry; since air transportation is utterly reliant upon motor carrier transportation for the local movement of airline traffic to and from the airports. Thus, it is most appropriate that the Commission has afforded the Board the initial opportunity to regulate the nature and extent of such service.

At first blush, the Commission's decision in the *Peoples Express Case*, supra, in which it refused to extend the exemption of Section 203 (b) (7a) to include motor transportation of air freight moving under airline contracts and shipping documents from Newark Airport to the very limits of Philadelphia, might possibly appear to be a contradiction of, or at least inconsistent with, the principles above indicated. Actually, however, such apparently exceptional action by the Commission was quite proper, and created no conflict with the Civil Aeronautics Board, since the Board had never given its sanction to such operations. The air carriers with whom *Peoples Express* had its contracts, and for whom it was acting, were not certificated airlines and were operating under a temporary exemption which relieved them from filing tariffs and contracts. Such exemption, a holdover from prewar conditions, has long since been abolished; and now all air freight carriers, as well as the scheduled airlines, are fully subject to

[19] The specific sections of the Civil Aeronautics Act under which the Board exercises full regulatory control over such contracts and services are the following: *Section* 412(*a*) which requires every air carrier to file with the Board a copy of every contract affecting air transportation between such air carrier and any other carrier for cooperative working arrangements; *Section* 412(b) which requires the Board to disapprove such contract if it shall find it to be adverse to the public interest, otherwise to approve it; *Section* 403(a) which requires the air carriers to publish in their tariffs all services which they provide in connection with air transportation; *Section* 403(b) which prohibits an air carrier from providing a service not so published in its tariff; and Section 1002(g) which authorizes the Board to suspend the publication of any tariff provision pending hearing and decision with respect to its lawfulness.

the aforementioned tariff and contract provisions, Sections 403 and 412 of the Civil Aeronautics Act.

Motor Carrier Service Provided Under Contract With Airlines as Emergency Substitute for Air Service

Airlines provide service to points which they are authorized to serve through airports approved by the Civil Aeronautics Board. Such approval includes not only the airport regularly used for such services, but also airports to be used under emergency conditions when the airport regularly used is unavailable. Unfavorable weather conditions are, of course, the usual reason for utilization of an alternate airport. In the *Graff* and *Blue Bird cases*,[20] the motor carrier operators, who were regularly engaged in transporting airline passengers between the Baltimore Municipal Airport and Baltimore, and between the Chicago Municipal Airport and Chicago, respectively, applied to the Commission for appropriate authority to transport such passengers between each of those cities and the alternate airport used when the Baltimore and Chicago municipal airports were unavailable. In the *Graff Case* the usual alternate was the airport at Washington, D.C., and in the *Blue Bird Case* the usual alternate was the airport at Milwaukee.

The Commission decided in both cases that such emergency service, although clearly rendered beyond what could conceivably be regarded as the "terminal areas" of the Chicago and Baltimore airports and unquestionably "line-haul" motor carrier operation in character, was nevertheless "incidental to transportation by aircraft" within the meaning of the exemption in Section 203 (b) (7a). The Commission specifically stated that cases previously decided by it involving regular, as distinguished from emergency, service were not precedents for deciding these two cases, and spelled out the following principles for cases of this type:

> "Connecting-carrier line-haul motor operations are complementary to air transportation services with which they connect and are conducted regularly as a part of through interline service. In contrast the operations here involved, though line-haul, are sporadic and irregular in point of time and emergency in character. They are furnished at the airline's expense and serve as a substitute for impossible or impracticable air transportation and not as a complement to regular air service. They are clearly subordinate to the regular air service; a necessary result or adjunct of it, without which, or its equivalent in some form, maintenance of regular air service would be more hazardous if not wholly impracticable on many occasions."[21]

The logic and soundness of this decision is indisputable, and extended discussion could add nothing.

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[20] *Theodore Graff, Common Carrier Application*, No. MC-108218, 48 MCC 310 (1948); *Blue Bird Air Service, Contract Carrier Application*, No. MC-107420, 48 MCC 310 (1948).

[21] 49 MCC 310 at 315-316.

III. Cases Involving Commercial Airline Traffic Transported by Motor Carriers Operating Independently of the Airlines

The third category of cases before the Commission involving Section 203 (b) (7a) concerns airline traffic transported to and from airports by motor carriers who do not operate under contract with the airlines and do not carry passengers or property for the airlines or under airline tickets or shipping documents.

General Considerations Affecting the Commission's Treatment of Cases in This Category

The exemption in Section 203 (b) (7a), in contradistinction to the exemption in Section 202 (c) (2), is not limited to incidental transportation performed by a person acting "as agent or under a contractual arrangement" with the line-haul carrier. The exemption in Section 203 (b) (7a) requires only that the motor carrier transportation be "incidental to transportation by aircraft." It is therefore evident that motor carrier operators may, within certain limits, engage in providing "incidental" ground transportation for airline traffic independently of the airlines; and the Commission has so recognized in the cases to be discussed in this section.

For economic or other reasons, the airlines do not, except in a very few instances, provide motor carrier transportation for airline passengers locally to and from the airports, nor do they provide air freight pickup and delivery service for all points which may regularly receive air service through a particular airport. Independent motor carrier operators have entered the field to fill these gaps; and also to compete at certain points with the motor carrier service actually provided by the airlines.

Since such service is provided by independent motor carrier operators and not by the airlines, the Commission, in determining whether that service is within the exemption of Section 203 (b) (7a), cannot rely on the factors regarded as so significant in the preceding category of cases, namely, airline contracts and tariffs and the concurrent jurisdiction of the Civil Aeronautics Board.

Since these services are not subject to the jurisdiction of the Board, and a finding by the Commission that such service is within the exemption of Section 203 (b) (7a) would free such motor carrier operations from all Federal regulatory authority, it would appear appropriate for the Commission to adopt a more conservative and critical approach in considering these cases than in considering cases involving service under airline contracts and tariffs which are also subject to the concurrent jurisdiction of the Board; and the Commission has, in fact, taken just such an attitude in several of these cases.

Analysis of Commission Decisions in Cases Involving Independent Motor Carrier Operators

The first case under Section 203 (b) (7a) involving this type of service was the *Seattle Transfer Company Case.*[22] An application was filed for a certificate authorizing the transportation of property between the City of Seattle and the Seattle-Tacoma Airport, through which United Air Lines served Seattle. The case was submitted to a joint board, and the recommendation of the joint board became the decision of the Commission by operation of statute. The opinion does not indicate that the service was one provided under contract with the airline or that the shipments moved in ground transportation under airline shipping documents. On the authority of the *Port Columbus Case,* supra, it was held that such motor carrier transportation for property which has had or will have a prior or subsequent movement by aircraft was within the exemption of Section 203 (b) (7a).

The Commission itself first considered this type of operation in the *Air Freight Delivery Service Co. Case,*[23] which was decided in conjunction with the *Sky Freight Case.* The application of *Air Freight* was for a certificate authorizing the transportation by motor carrier of air freight between the Newark Airport and points in the commercial zone of New York City, which does not include Newark. The findings of fact indicated that *Air Freight* was rendering such service for the account of seventy shippers and in addition served several airlines; but the airline service apparently was not under contract, although the Commission indicated that such contracts were contemplated. In its discussion and in drawing its conclusions, the Commission treated both the *Sky Freight* and the *Air Freight* applications together, and found them both to be within the exemption. The *Air Freight* application appears actually to have presented the Commission with a considerably narrower and simpler issue than that raised by the *Sky Freight* application. This latter application involved both the Newark and La Guardia airports and all points named in American Airlines' terminal area tariff, which covered numerous points in both New York and New Jersey in the areas surrounding those airports; whereas, the *Air Freight* application was limited solely to service between the Newark Airport and points in the New York City commercial zone. The holding that the *Air Freight* application involved exempt service therefore appears to have been governed solely by the fact that the Newark Airport is one of the airports regularly used by the airlines in providing service to and from the New York City area.

In the *Teterboro Motor Transportation Case,*[24] the Teterboro Company applied for authority to transport airline passengers between

[22] *Seattle Transfer Co. Extension—Seattle-Tacoma Airport,* No. MC-67020, 6 Fed. Car. Cas. 154 (1947), 47 MCC 1064.

[23] *Air Freight Delivery Service, Inc., Common Carrier Application.* No. MC-106730, 47 MCC 229 (1947).

[24] *Teterboro Motor Trans. Inc., Common Carrier Application,* No. MC-106283, 47 MCC 247 (1947).

Bendix Airport at Teterboro, New Jersey and New York City and between that airport and points in New Jersey within twenty-five miles of the airport. This operation was to be conducted independently of the airlines. The Commission held that the proposal, insofar as New Jersey points were concerned, met the requirement established in the *Sky Freight Case* that the traffic carried "must as a prerequisite have an immediately prior or subsequent movement by aircraft" and further held that the Newark Airport could reasonably be considered as the airport intended to serve points in New Jersey within a twenty-five mile radius thereof. On the basis of these findings the proposed service to the New Jersey points was held exempt; but because the operation to New York City would include other than airline passengers, a certificate was issued for such operation.

In the *Peter Picknelly Case*,[25] an application was filed by Picknelly for authority to transport airline traffic between Springfield, Massachusetts and Bradley Field, at Windsor Locks, Connecticut, a distance of thirteen miles, including such service at the intermediate points en route, Agawam, Massachusetts, and Suffield, Connecticut. Both United and Eastern Air Lines testified that they proposed in the immediate future to use Bradley Field in providing service for Springfield, but Picknelly's service was not to be under contract with the airlines. The Commission found Picknelly's proposed service to be within the exemption of Section 203 (b) (7a). The significant findings supporting this conclusion are the following:

> "It accordingly becomes necessary merely to determine whether the transportation to be performed will constitute a line-haul movement. We do not believe that it will. Springfield is but thirteen miles from the airport in question, *not an undue distance for an out-of-town airport*, and the intervening area is sparsely settled. It is apparent that the operations here considered are in fact delivery service from and to the airport and Springfield, and are designed for the use of passengers of airlines whose services are essentially services to and from the Springfield area."[26] (Emphasis added.)

A situation similar to the *Peter Picknelly Case* was presented in the *Atterholt Case*.[27] A certificate was requested authorizing independent motor carrier service for airline traffic between the Youngstown Airport and Youngstown, Warren, Sharon, and other points in Mercer County, Pennsylvania. The Commission found such service to be within Section 203 (b) (7a), holding:

> "Youngstown, Warren, and Sharon form the three corners of an equilateral triangle. Vienna, adjacent to which is the airport, is located between Sharon and Warren on the side of the triangle opposite Youngstown, so that it appears to be about as close, possibly closer, to Sharon than it is to Youngstown. *Obviously it serves the area.* Although the proposed hauls are somewhat longer than

[25] *Peter Picknelly, Extension of Operations*, No. MC-61016 (Sub. No. 7) 47 MCC 401 (1947).

[26] 47 MCC 401 at 405.

[27] *James & Eliz. Atterholt, Common Carrier Application*, No. MC-108176, 7 Fed. Car. Cas. 178 (1949).

> might be expected in this area we are convinced that the record shows a proposal to engage in operations which are incidental to transportation by aircraft and within the exemption provided by Section 203(b)(7a)."[28] (Emphasis added.)

Likewise, in the *Hudgins Case*,[29] an application for authority to transport air freight between the airports within fifteen miles of Dallas and Fort Worth, on the one hand, and both Dallas and Fort Worth on the other hand, was filed with the Commission by an independent motor carrier. In holding that such service was within the exemption, although hauls up to forty-five miles may be involved, the Commission stated that it so found, among other reasons, "because the airports involved are designed for service to and from both Dallas and Fort Worth, including the metropolitan areas of each."

But not all cases decided by the Commission under this category involved findings that the proposed service was within the exemption of Section 203(b)(7a). Just as in the *Peoples Express Case*,[30] the Commission placed a limit on the scope of such service when rendered under airline contract, so, in the *Bruce Koch Case*,[31] the Commission placed a limit on service rendered by independent motor carriers. In the *Bruce Koch Case*, an application was filed by an independent motor carrier for authority to transport air freight for shippers and consignees between the Vandalia airport, on the one hand, and Dayton (ten miles south), Springfield (twenty-four miles east), Sidney (thirty-two miles north), and Richmond (forty miles west). In holding that the service within the exemption of Section 203(b)(7a) was limited to that in the vicinity of Vandalia and Dayton and points within the commercial zone of Dayton, the Commission stated:

> "The mere fact that the proposal involved is restricted to traffic having an immediately prior or subsequent movement by air is not enough, standing alone, to require the conclusion that the proposed motor service is subject to the partial exemption. Some of it, the portion confined to the immediate vicinity of Vandalia no doubt is exempt. Also the operations to and from Dayton and points in the Dayton commercial zone appear to be exempt, the Vandalia airport being known, as above indicated, as the Dayton Municipal Airport. Beyond this we cannot go. Available maps indicate a number of airports as close or closer than the Vandalia airport to Springfield, Sidney, and Richmond. There is no showing that the Vandalia airport is the airport normally or regularly used in supplying air service to and from these three points or any of them."[32]

In the *Air Terminal Facilities of California Case*,[33] on the other hand, an independent motor carrier filed an application to provide

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[28] 7 Fed. Car. Cas. 178 at 179.

[29] *W. P. Hudgins, Contract Carrier Application*, No. MC-109237 (Sub. No. 1), 7 Fed. Car. Cas. 168 (1949).

[30] *Supra* note 8.

[31] *Bruce C. Koch, Common Carrier Application*, No. MC-108663, 49 MCC 555 (1949).

[32] 49 MCC 555 at 557.

[33] *Air Terminal Facilities of California, Common Carrier Application, No.* MC-109626 (1949), unreported.

motor carrier transportation for air freight to points within a fifty-mile radius surrounding the Los Angeles Municipal Airport and to points within a seventy-five mile radius of the San Francisco and Oakland airports, although evidence at the hearing indicated that the bulk of such service was currently being performed within thirty miles of such airports. The Commission found, on the basis of the facts of the record, that the San Francisco Municipal Airport, the Oakland Municipal Airport, and the Los Angeles Airport were ". . . the only airports in these areas which can be, and are used by the regular commercial airlines. They are obviously the airports designed for service to and from the points in the respective areas . . ." On the basis of such finding it held that the proposed service was within the exemption of Section 203 (b) (7a).

Conclusions With Respect to Independent Motor Carrier Service for Airline Traffic

In applying the exemption in Section 203 (b) (7a) to ground transportation of air traffic provided by motor carriers operating independently of the airlines, the Commission has very properly approached such cases cautiously and critically, since a finding that such service is exempt would leave such service free from any Federal regulatory authority. In none of these cases, of course, does the Commission impose the limitation that the shipments must be moving on commercial airline or air express bills of lading, for it is obvious that such shipments could not be so moving when the motor carrier is operating independently of the airlines. The only restriction which the Commission does place in its decisions, which find such service to be within the exemption, is that the shipment or person carried must have an immediately prior or subsequent movement by aircraft. The only relevant facts upon which the Commission may rely in making its decision, when such service is not offered by the airline itself, are thus limited to the nature of the actual movement of airline traffic and the geographical relationship between the particular points involved. The criteria which have emerged from these decisions is that the airport concerned must not only be used regularly by the airlines for receiving and delivering traffic originating at or destined to the cities and towns included within the motor carrier service pattern, but such airport must also be clearly designed to provide such service. These considerations obviously present a more difficult problem to the Commission than when the service is provided under an airline tariff and pursuant to an airline contract, both of which are subject to Civil Aeronautics Board authority; and in the last analysis the question comes down almost entirely to a matter of the exercise of reasonable judgment and discretion by the Commission.

Summary and Conclusion

When Congress, by Section 1107 (j) of the Civil Aeronatics Act of 1938, amended Section 203 (b) of the Interstate Commerce Act to create an exemption for motor carrier transportation incidental to transportation by aircraft, it offered no clue as to the meaning of the term "incidental" as so used. Since the exemption is, in effect, a limitation on the authority of the Interstate Commerce Commission over such operations, the Commission had the primary duty of construing the scope of such exemption. The cases which have arisen before the Commission involving this exemption fall into two distinct categories, prewar cases and postwar cases. The prewar cases were concerned solely with the air express traffic of the Railway Express Agency; and the Commission, without endeavoring to analyze or define the exemption, held that local motor transportation of such traffic for the Express Agency should be certificated along with the Express Agency's rail express rights. These cases have been distinguished, and probably may be regarded as over-ruled, by the postwar cases; and in any event they have been totally disregarded by the Commission in its many postwar decisions involving this question.

The postwar cases before the Commission involving Section 203 (b) (7a) have been concerned with motor carrier ground transportation of both air passengers and air freight. The Commission has held, with only one readily distinguishable exception, that when such services are provided under the airline tariffs by motor carriers under contract with the airlines, and are thus under Civil Aeronautics Board control, they fall within the exemption. On the other hand, when such services are rendered by motor carriers operating independently of the airlines, with the result that the Civil Aeronautics Board has no control over such operations, the Commission critically examines the area of proposed services; and only if the airport concerned is regularly used by the airlines and such airport is clearly intended to serve the town to which the motor carrier proposes service, will such operation be held to be within the exemption.

The principles thus developed and applied by the Commission in the numerous cases which have been presented to it involving an interpretation of Section 203 (b) (7a) appear to be consistent with Congressional intent and with sound administrative practice. The airlines have taken no issue with the Commission with respect to these decisions, and have developed their pattern of ground transportation for airline traffic within the framework of the principles thus enunciated; and although the line-haul motor carriers apparently are somewhat fearful that such exempt motor carrier transportation might someday invade their certificate rights, to date no line-haul motor carrier has been able to demonstrate to the Commission that its construction and application of the exemption in Section 203 (b) (7a) has produced any harmful effects on the motor carrier industry.

THE "AIR COACH" EXPERIMENT AND NATIONAL AIR TRANSPORT POLICY — PART II*

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WE have pointed out that the present air coach service "experiment" involves more than merely experimentation with fares. It may foreshadow changes in our national civil aviation policy and a substantial rearrangement of our air transport pattern. Before considering these possibilities, it will be helpful to review the present state of our national air policy, and its background.

IV. OUR NATIONAL POLICY FOR CIVIL AVIATION

It is not easy to define our national policy objectives with a satisfactory degree of certainty. Our only legislative pronouncement on the subject, the Declaration of Policy contained in the Civil Aeronautics Act,[1] is so all-embracing as to mean anything or everything to any person. The civil air transport system there envisaged is one "properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense," designed to furnish "adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices," and with "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."

And in connection with this section there must also be considered the "mail pay" or "subsidy" provision of the Act,[2] which is itself also an important statement of very general policy. It is there stated that in determining the amount of money to be paid by the Federal Government to an air carrier for the transportation of mail, the Civil Aeronautics Board shall take into consideration the carrier's need "for compen-

* Continued from Winter issue of JOURNAL, 17 J. AIR L. & COM. 1 (1950). The opinions expressed in this article are those of the writers and are not to be attributed to the Civil Aeronautics Board.

[1] 52 Stat. 980, Sec. 2; 49 U.S.C. 402.

[2] *Ibid.*, Sec. 406(b); 49 U.S.C. 486(b).

sation for the transportation of mail sufficient for the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

It is not surprising that there has been a considerable diversity of opinion as to the proper implementation of such broad legislative standards. Obviously, an air transport system properly adapted to the present and future needs of foreign and domestic commerce will mean one thing to one person and something else to another. A system designed to meet the needs of the postal service may be a system more or less extensive than one required to serve foreign and domestic commerce, and a system suited primarily to national defense needs may be considerably different from either. And what is the meaning of "competition to the extent necessary to insure the development of an air transportation system properly adapted to the needs of the foreign and domestic commerce," etc.? [3]

The search for a civil air transport policy which can more nearly be expressed in terms of common understanding has gone on almost continuously since the passage of the Civil Aeronautics Act. Various Congressional committees, Presidential commissions, executive agencies and private organizations and individuals have wrestled with the problem from time to time, and the effort continues right down to the present. The very fact that an answer has been sought so extensively seems to indicate that we really have no firm, settled policy at this time, and perhaps in the present troubled state of the world this is just as well. Under present conditions, the needs of national defense and interstate and foreign commerce in relation to air transport may change overnight.

But in order to evaluate the worth and effect of the current experimentation in "air coach" transportation, it would seem essential that we attempt to reach some basis of common understanding with respect to policy objectives, or possibly to consider alternative concepts and examine the experiment on that basis. A brief review of certain expressions of policy during the interval since the origin of the Civil Aeronautics Act should be helpful.

Federal Aviation Commission

A good place to start should be with the Federal Aviation Commission appointed by President Roosevelt pursuant to the Air Mail Act of 1934.[4] That statute authorized the President to appoint a committee

[3] The interpretation of this phrase has been a particularly troublesome problem for the Civil Aeronautics Board. For a history of the Board's shifting position on "competition," see Westwood, *Choice of the Air Carrier for New Air Transport Routes*, 16 Geo. Wash. Law Review 159 (1948).

[4] 48 Stat. 195; 39 U.S.C. §§469 and 469*s*.

for the purposes of an immediate study and recommendations for "a broad policy covering all phases of aviation and the relation of the United States thereto."

In an editorial published at the time, Dr. Fred Fagg, Jr., now President of the University of Southern California, then Professor of Law at Northwestern University and soon to become legal advisor to the Commission, reframed the question to which the Commission was supposed to find an answer as follows: Is the airline business to be brought to maturity under the Adam Smith conception of competition or under the guidance of the "newer" economics? [5]

The Commission had little doubt as to the kind of civil air transport system to be encouraged and developed. Its first recommendation read as follows:

> "It should be the policy of the United States to maintain a position of world leadership in air transport, and to lend such aid as may be necessary to insure that the most modern and efficient equipment and methods shall be applied on American domestic and foreign airlines."[6]

Nor was there any question about the use of subsidies. The third recommendation read:

> "The carriage of mail should be put on a commercial basis, with payments to lines within the amount received by the Post Office. Whatever additional sums are for the time being necessary to maintain and develop adequate transport services should be allocated specifically to that purpose by the Government."[7]

The report went on to recommend the establishment of a permanent commission, appointed by the President, which would have broad general supervisory and regulatory powers over both domestic and foreign air transport.

The Commission report was transmitted to Congress on January 21, 1935, and the entire recommended program was embodied in a bill, H. R. 5174, introduced on the same day by Mr. Lea of California. Three and a half years and several bills later, during which time there had been almost constant Congressional hearings, the Civil Aeronautics Act was passed. At several times during the hearings and debates over the various proposed bills and amendments, sponsors stated that financial aid to air transportation by the Government was to be a temporary affair, to last only until the infant industry could walk on its own legs, but nowhere was this concept set forth in the Act.

If the language used in the Declaration of Policy — "the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense"

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[5] 5 J. AIR L. 540 (1934).

[6] Report of the Federal Aviation Commission (January, 1935) p. 9. See 6 J. AIR L. 163 (1935).

[7] *Ibid.*

— is intended to mean what was so boldly expressed in the Commission report, then Congress envisaged an air transportation system which would lead the world both domestically and internationally, to be supported with Government funds to the extent necessary to insure such leadership and the utilization of the most modern and efficient equipment and methods.

Board of Investigation and Research

No important questions as to national air transport policy were raised during the years between the passage of the Civil Aeronautics Act and the end of the war. We were preoccupied with other important matters, and, furthermore, most of the airlines were in no position to expand and in no great need of financial aid. Congress did, however, establish in 1940 a Board of Investigation and Research [8] which was to investigate and report on public aids to domestic transportation generally. In a report submitted to Congress on September 18, 1944,[9] this Board pointed out that the financial assistance provided by Section 406 (b) of the Civil Aeronautics Act would have a profound effect upon the kind, size, and type of our civil air transport system. The report quoted with approval portions of a letter addressed by the Civil Aeronautics Board to Senator Walter F. George in 1942,[10] in which the Board stated its position to the effect that in its view Congress had not intended to direct the Board to achieve national objectives wholly unrelated to the development of a sound air transportation system.[11]

The report further stated that specific recommendations would be premature, but remarked:

> "It seems not unlikely that the future development of air transportation will be influenced to a significant extent by what Government policy regarding financial aid is to be. The progress of civil air transport could be accelerated to almost any extent by requisite Government expenditures."[12]

There were also quoted with approval excerpts from Civil Aeronautics Board Member Harllee Branch's separate opinion in a mail-rate proceeding [13] in which he persuasively argued that financial aid to the

[8] Transportation Act of 1940, Title III, Part I, Sec. 302 (a) (2); 54 Stat. 953.

[9] Public Aids to Domestic Transportation, H. Doc. 159, 79th Cong., 1st Sess. (1944).

[10] *Ibid.*, p. 464.

[11] "If the contrary interpretions were adopted, there would be no limit to the national defense projects which carriers might be expected to perform; and the required financial assistance from Post Office appropriations might well be multiplied many times. The Board does not understand that Congress intended to authorize the Board to require air carriers, for example, to build up a large reservoir of aircraft, personnel, equipment, and other facilities greatly in excess of the requirements of a civil air transportation system, to be held virtually in trust or on call for war air-transport purposes. Congress vested in the Board no power by which it might effect such a result, and in the absence thereof, the objective of such a reservoir of planes, equipment, and reserve personnel, and organization could be realized only through the voluntary co-operation of the carriers . . . It normally would not be possible to absorb such a reservoir of aircraft, equipment, and such an organization in a sound air transportation system."

[12] Op. cit. *supra*, n. 9, p. 465.

[13] Eastern Air Lines, Inc., Mail Rates, 3 C.A.B. 733, 761 (1942).

airlines should be based on a policy of promoting a financially self-sufficient air transport system composed of individually profitable airlines, receiving only a fair and reasonable compensatory rate for the carriage of mail.

Soon after the end of hostilities, however, due to over-optimism, revolutionary advancements in the aviation art, and a too-rapid expansion in routes and facilities, most of our certificated airlines, domestic and foreign, got into financial difficulties. Some were faced with bankruptcy, and almost all were in desperate need of working capital and capital funds to meet requirements for new postwar equipment.

It seemed that the broad statement of national policy objectives contained in the Civil Aeronautics Act needed a second look, and there was concern both in the White House and on Capitol Hill. This concern suddenly crystallized into action in the summer of 1947, when, within a period of a few weeks, the President took steps to have a coordinated statement of air policy prepared by the Executive Branch, and appointed a special committee to assist him "in formulating an integrated national aviation policy." At the same time a temporary "Congressional Aviation Policy Board" was set up by the 80th Congress with the same general objective.

President's Air Policy Commission

The President's Air Policy Commission was created on July 18, 1947.[14] The Commission submitted its report on January 1, 1948.[15] In discussing civil aviation it supported the concept of a self-sufficient air transport system,[16] but, somewhat inconsistently, also endorsed for

[14] In his letter of appointment the President said in part: "There is an urgent need at this time for an evaluation of the course which the United States should follow in order to obtain, for itself and the world the greatest possible benefits from aviation.

"It is for these reasons . . . I am creating a temporary Air Policy Commission to make an objective inquiry into national aviation policies and problems, and to assist me in formulating an integrated national aviation policy . . .

"The Air Policy Commission should study, among other pertinent aspects of the problem, such questions as the current and future needs of American aviation, including commercial air transportation and the utilization of aircraft by the armed services; the nature, type, and extent of aircraft and air transportation industries that are desirable or essential to our national security and welfare; methods of encouraging needed developments in the aviation and air transportation industry; and improved organization and procedures of the Government that will assist it in handling aviation matters efficiently and in the public interest.

"The final recommendations of the Commission must, however, go beyond the limits of any one phase of aviation. They should be so broad in scope and purpose that they will assist in revising old policies and in framing new ones, and will serve as a guide for formulating a carefully considered national air policy."

[15] SURVIVAL IN THE AIR AGE, January 1, 1948. See 15 J. AIR L. & COM. 69 (1948).

[16] "We consider that direct Government financial aid to commercial airlines is fully justified on grounds of national security and economic welfare. We believe the air transport system of this country can, with such aid now, become self-supporting in the future. We are convinced that any impartial investigators of air transport would endorse the use of public funds to obtain such a sound air transport system. This means the continued granting of subsidies to airlines for an additional period." (p. 102.)

"Our major problem is to get [common carrier airlines] started once again up the ladder toward self-sufficiency." (p. 113.)

the most part the view that the civil air transport system should be inseparable from the military air arm, and as a reservoir of aircraft, personnel, equipment and other facilities to be drawn upon by the military in time of emergency. This seeming contradiction can be reconciled only on the basis that the Commission concluded that a civil air transport system composed of privately owned and managed airlines (strong, financially sound and self-sufficient) and operating as public utilities, would fit all the needs of Commerce, the postal service *and* the national defense.

Congressional Aviation Policy Board

The law establishing a temporary Congressional Aviation Policy Board became effective on July 30, 1947,[17] and after extensive hearings its report was submitted to Congress on March 1, 1948.[18] The first sentence of the report reads as follows:

> "Within two years after cessation of hostilities in World War II, general concern over national security and the threatened bankruptcy of the aircraft industry and the civil air carriers of the United States, indicates necessity for review of national aviation policy by the Congress."

The Congressional group did not deal directly with the concept of an individually self-sufficient air transportation system, but laid more emphasis upon the national defense aspect. At the risk of oversimplification, and only for the purposes of discussion here, it may be said that the Congressional Board reached the following conclusions:

1. The Civil air transportation industry and the military air arms are indivisible and must fit into a single pattern.
2. National security requires a financially sound, efficient and modern air transport industry.
3. The country should have a large civil air fleet operating in foreign and domestic air commerce with safety and certainty, serving commerce and industry during peacetime while remaining available for immediate conversion to military use in an emergency.
4. Such a civil air fleet must be as large as possible commensurate with the budgetary limits of our economy.
5. This may best be effected by the stimulation of passenger, cargo and other air traffic.

The report listed as possible means of stimulation of traffic the carriage of all first-class mail by air at first-class rates when the movement of such mail could be appreciably expedited, the carriage of domestic air parcel post at experimental rates, and the extension to a 5-year basis of the feeder-line experiment. No attempt was made to estimate the desirable size of the civil air transport reservoir of potential

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[17] Public Law 287, 80th Congress; 61 Stat. 676. See 14 J. AIR L. & COM. 365 (1947).

[18] *National Aviation Policy*, Rep. No. 949, 80th Cong., 2nd Session, March 1, 1948. See 15 J. AIR L. & COM. 208 (1948).

logistic aircraft, because it had been impossible to secure an estimate of the requirements of the military from the Joint Chiefs of Staff.

The implications of this report and the broad outline of policy contained in it would lead directly to the conclusions that the assumption of the Civil Aeronautics Board in 1942 that Congress did not intend to direct the Board to achieve national objectives unrelated to the development of a sound air transportation system could no longer be supported, and that if military requirements were such that they could not be met by the available aircraft of a financially sound and self-sufficient civil air transport industry, then that industry would be expanded to the extent necessary to meet military requirements within "budgetary limits that can be supported by the American economy."

ACC Statement of Air Policy

Meanwhile, prior to the appointment of the Air Policy Commission, President Truman had requested that a statement of air policy be prepared and presented to him by the Air Coordinating Committee.[19]

This statement was prepared and presented to the President on August 1, 1947.[20] "The basic policies governing United States transport," said the Air Coordinating Committee, "are embodied in the Civil Aeronautics Act of 1938. The Civil Aeronautics Board in its decisions undertakes to apply policies derived from the Act rather than to create new policies." The Committee made no attempt to make more definitive the concept of civil air transport policy contained in the Declaration of Policy of the Civil Aeronautics Act, except as may be inferred from the following statement:

> "Despite the high volume of traffic, air travel is still relatively expensive compared to other forms of transportation. Although improved service, comfort and speed increase business, present rates remain a limiting factor on the growth of traffic. The ultimate goal of government rate policy is inexpensive, mass air transportation provided by private carriers *which are financially sound and which can operate without subsidy.*" (Italics added.)

No emphasis was placed upon the development of civil air transportation as a potential transport reserve in time of emergency, the Committee merely stating that in time of war it must be possible to utilize the commercial air transport system to augment the military air transport services.

Since their publication, the conclusions and recommendations expressed in these reports have been widely considered and discussed,

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[19] An interdepartmental advisory and coordinating group consisting of one representative each from the Departments of State, Commerce, Air Forces, Navy, Post Office, and the Civil Aeronautics Board, with a representative of the Bureau of the Budget serving as a nonvoting member.

[20] A Statement of Certain Policies of the Executive Branch of the Government in the General Field of Aviation (August, 1947). See 14 J. AIR L. & COM. 366 (1947).

both in and out of the Government, but up to the present time no legislative expression of a more clearly defined national air policy has resulted.

Meanwhile, official exploration of the subject continues. The investigation of the airline industry instituted by the Senate Interstate and Foreign Commerce Committee early in 1949, under the able Chairmanship of Senator Edwin C. Johnson, is still under way, and will of necessity involve important policy considerations. In addition, President Truman has been concerned with the overall coordination of Federal programs in the various fields of transportation, and air transport policy is likewise an important element to be considered in any planning in this area.

Sawyer Report

In connection with the latter project, the President on August 30, 1949, requested the Secretary of Commerce to outline "the major policy issues which need to be resolved at this time in order to achieve maximum effectiveness and consistency of Federal programs in the transportation field. The Secretary's report, which was submitted on December 1, 1949, was something more than a statement of issues, however, for, as the report pointed out, a future transportation program could best be considered if the issues were developed against a policy framework. Consequently, the Secretary's presentation developed certain concepts vitally related to civil air transport development. The Secretary stated that:

> "The general position which this report advances is that if another type of carrier or another carrier of the same type can perform the service at a profit, it is entitled to the business and the carriers which are being protected should restrict themselves to operations in which they have a clear economic advantage. This general principle is set forth in the Transportation Act of 1940 as basic national transportation policy. An exception to this general principle applies in cases where certain relatively uneconomic services must be maintained because their continued existence is essential for national defense purposes."[21]

This view of national policy would call for the discontinuance of present protective regulation by the Civil Aeronautics Board designed to maximize revenues for the certificated air carriers. For example, it would be inconsistent with such a concept to impose economic restrictions upon the operations of irregular air carriers, rather than to permit them complete competitive freedom with all the certificated air lines, Government-aided or not.[22] In short, full freedom of opportunity should prevail, governed only by natural economic forces.

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[21] *Issues Involved in a Unified and Coordinated Federal Program for Transportation*, U.S. Dept. of Commerce, December 1, 1949, p. 74. See 17 J. AIR L. & COM. 93 (1950).

[22] *Ibid.*, p. 73.

In developing this concept, the Secretary took the position that the transportation system of this country, including air transportation, is now developed to the point that services which are not self-supporting should be abandoned, and the regulating authorities should encourage carriers under their jurisdiction to divest themselves of all marginal operations.[23]

Thus we have the range of policy concepts with respect to civil air transport. At one extreme there is the approach of the Congressional Aviation Policy Board, which seems to envisage a civil system integrated with defense requirements, and subsidized to the extent militarily necessary within the budgetary limits of our economy. Directly opposed is the position of the Secretary of Commerce, who advocates the abolition of Federal economic regulation and the substitution of free competition, including the elimination of all non-self-supporting services.

The significance of the air coach development must be measured largely in terms of the long-range air transport policy ultimately adopted.

V. The Trend of Air Coach Service

As presently operated, air coach service is a very attractive bargain. The opportunity to travel on our largest, fastest and most modern aircraft at reductions of 25 percent to 40 percent under standard fares, with intermediate stops reduced to a minimum, naturally has great consumer appeal. Such limitations on passenger service as exist — nighttime departures, more crowded seating arrangements, etc. — are for many travelers completely outweighed by the price advantage which can be realized, and, in areas of heavy traffic flow, coach operations to date have clearly demonstrated this fact.

On high-density route segments, coach flights have operated at very high load factors, and have carried an impressive total of passengers. For example, Capital Airlines operated its New York-Chicago coach service in 1949 at an average load factor of 76.91 percent, carrying a total of 43,106 passengers.[24] For the year ending March 31, 1950, between Washington and Chicago the load factor was 78.25 percent, with 43,785 passengers. During the same period Northwest's New York-Seattle service operated at a load factor of 78.40 percent, and carried over 90,000 passengers.

Even allowing for diversion from regular services, which has been estimated on an overall basis to be approximately 31 percent, and on a fully allocated cost basis, such operations are substantially profitable, and hence appear, when considered apart, to rest upon an economically

[23] *Ibid.*, pp. 83-4.

[24] It should be noted that during the first quarter of 1950, however, load factors fell to 56.17 percent, reflecting the additional competition of American Airlines, which entered the market for the first time on December 27, 1949.

sound foundation. It is becoming apparent, however, that only a limited number of route segments have a sufficiently high average traffic density to enable the achievement of such favorable results.

Using the same carriers as examples, Capital's New York-New Orleans service, operated in competition with Eastern Air Lines, attained a load factor of only approximately 43 percent through the first quarter of 1950, and Northwest's Chicago-Portland service was under 45 percent for the same period. Such figures represent a loss even at standard fares, and under present operating limitations these services show little promise of economic success. It would appear than on such routes even bargain rates will not attract sufficient traffic to produce the high load factors required to make a payload at reduced fares.

A similar situation exists with respect to other carriers. The transcontinental coach services of TWA and American between New York and Los Angeles, operating with Constellation and DC-6 aircraft, have to date consistently carried almost capacity loads. Eastern has achieved impressive operating results between New York and Miami. Over leaner routes, however, such as Kansas City-Los Angeles and New York-Atlanta, the figures are not encouraging.

In short, experience to date tends to confirm that air coach service, at least under present limitations, will be economically sound in and of itself only on the exceptionally heavy traffic routes. And even these routes can be assessed only in terms of the amount of duplicating competition which may exist between each of the pairs of cities.

The number of such heavily traveled segments is extremely limited, and there are practically none without existing duplicating competition. Air travel has traditionally been characterized by an extreme concentration of traffic at a relatively small number of stations. As was pointed out previously, the 10 largest airline stations account for almost 50 percent of the total domestic travel market. And in March, 1949, only 38 pairs of cities, out of a total of over 15,000 combinations, developed as many as 50 airline passengers per day in each direction.[25]

It should also be pointed out that on the very short-haul high-density segments, such as New York-Boston and New York-Washington, for example, it is unlikely that under present operating conditions coach service can be operated without severe disruption of earnings, for the production cost of all travel rises quickly as the length of haul is diminished. Possibly such short segments may be successfully operated as part of a long haul, but the short haul, in itself, will hardly be ready for coach fares until operating costs can be substantially reduced by some method as yet undiscovered.

It is thus immediately apparent that even assuming in substantial degree the generation of new air passengers as a result of the operation

[25] A total of 24 of these principal pairs of cities already received scheduled air coach service as of July 1, 1950.

of coach services, there is a very definitely restricted area in which such operations can be expected to develop on a self-sufficient basis.

As was inevitable, however, the pressures for rapid expansion of coach services, from both the airlines and the public, have been great. Proposals have regularly been advanced to increase the number of schedules permitted, to use larger and faster aircraft, to activate new air-coach routes, to add additional points to present routes, and to liberalize the operating restrictions under which the service has been conducted. To some extent these efforts have been successful, and the past few months have seen a continuous, gradual extension of coach operations.

Since the first of this year several important new coach routes have been authorized.[26] Additional points have also been added to present routes.[27] As of July 1, 1950, certificated air coach service was received by 32 domestic cities, including 16 out of the 20 leading traffic-generating points. See Exhibit 4.

CAB Adherence to Coach Policy

In other respects, however, the Civil Aeronautics Board has adhered fairly closely to its announced policy respecting limitations on the coach-service experiment. Proposals by various carriers to substitute newer and larger equipment for the DC-4s currently in use have been generally denied, and all presently operating coach flights are being conducted with high-density DC-4 equipment, with the exception of the transcontinental services of TWA and American, where Constellation and DC-6 aircraft, respectively, are being used. Likewise, the limitation of departures to off-peak hours has also been maintained for the most part, the only recent deviation from this restriction having been in connection with the services of United and Western between Los Angeles and San Francisco. In that case the Board, because of the particular competitive situation resulting from intensive operations by intrastate carriers, permitted not only departures at peak hours, but also the operation of multiple schedules. Both of the carriers presently operate four round trips per day between these points, departing at convenient hours throughout the day.

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[26] Capital has added a Washington-Chicago nonstop service; Eastern and National have both been authorized to operate a second New York-Miami schedule via Washington, Jacksonville and West Palm Beach; Eastern has added a New York-Houston service via Washington, Atlanta and New Orleans, as well as a Detroit-Miami service via Cleveland, Charlotte, Atlanta and Tampa; and both United and Western now operate local coach service on a nonstop basis between San Francisco and Los Angeles. United has also received permission to operate a competitive service to Western between Los Angeles and Portland-Seattle, via San Francisco. Recently an application by Chicago and Southern to establish a route between Chicago and New Orleans was also approved.

[27] Delta now operates its Chicago-Miami service via Cincinnati, Atlanta and Jacksonville, and the latter 2 cities have likewise been added to Eastern's operation between the same terminals. Great Falls, Montana, is a recently authorized stop on Northwest's New York-Seattle coach schedule.

Exhibit 4—DOMESTIC CITIES SERVED BY AIR COACH FLIGHTS OF CERTIFICATED CARRIERS ON JULY 1, 1950

National Ranking		*Origination and Destination Passengers*		
March 1949	*City*	*March* 1948	*September* 1948	*March* 1949
72	Albuquerque	4,275	5,200	5,541
67	Amarillo	4,439	5,731	5,798
14	Atlanta	26,290	30,676	34,023
93	Billings	2,665	3,244	3,070
42	Birmingham	8,123	9,827	10,022
48	Charlotte	6,612	7,805	8,858
2	Chicago	104,094	137,940	133,635
21	Cincinnati	16,632	23,288	21,388
9	Cleveland	34,230	44,787	40,769
8	Detroit	50,457	64,097	55,231
130	Great Falls	1,536	2,041	1,858
17	Houston	23,494	26,501	28,813
33	Jacksonville	10,677	10,317	13,708
12	Kansas City	24,824	30,841	35,207
52	Knoxville	6,839	9,386	8,280
4	Los Angeles	71,797	92,432	80,292
7	Miami	60,300	27,676	62,815
30	Milwaukee	12,388	16,264	14,607
16	Minneapolis-St. Paul	26,682	28,915	29,706
86	Mobile	2,475	3,876	3,860
18	New Orleans	18,464	21,050	25,851
1	New York-Newark	215,699	301,896	273,722
35	Phoenix	11,439	8,974	13,234
11	Pittsburgh	32,810	44,524	38,079
20	Portland	22,156	27,600	22,575
6	San Francisco-Oakland	62,398	81,708	65,988
15	Seattle	31,686	38,427	31,265
49	Spokane	7,682	8,253	8,623
25	Tampa	13,461	8,088	17,952
3	Washington	70,016	87,820	89,109
58	W. Palm Beach	6,135	1,070	7,706
55	Wichita	6,374	7,868	8,014

Source: C.A.B. Surveys.

Other than the above-mentioned exception, schedules have been held to one round trip per day over each route. In a sense, however, this limitation is more theoretical than real, since no supervision has been exercised over the number of "extra sections" operated on an individual schedule, with the result that the number of *trips* operated on a single day may be many more than the one *schedule* authorized. Over certain routes, the amount of extra section mileage operated has consistently exceeded 50 percent of the total air coach service flown.

In summary, it is evident that while the Board approach continues to be conservative, the expansion of coach operations during recent months has been both continuous and significant. The effect is particularly marked in some areas, and the long-range problems involved are already becoming evident. As it is presently the operator of the most extensive air coach services, an examination of Eastern Air Lines' current situation may be rewarding.

Eastern currently provides air service to some 72 domestic points. Out of this number, only 15 are served on air coach schedules. *But included among these air coach points are* 10 *of Eastern's* 15 *principal traffic centers.* And with the exception of the New York-Boston and St. Louis-Washington segments, its coach services blanket practically every important city combination on its system. Several of these points are included on different routes, and thus have more than one coach schedule per day, and extra sections are operated as traffic demands.[28] Either directly or through connecting services, coach flights are available for all or portions of the journeys between most of the pairs of cities on its entire system.

As a result, there is subjected to possible diversion to the lower priced coach service a large portion of the traffic of Eastern and the carriers competing with it, and the general effect may very well amount to an important step in the direction of making the 4-cent coach fare the basic level.

This is true not only for Eastern, but for all the other carriers in Eastern's competitive area. The problems which are raised with respect to competitive services are illustrated by the case of Chicago and Southern, with reference to Eastern's connecting coach service between Chicago and Detroit, on the one hand, and Houston and New Orleans on the other. In protesting to the Civil Aeronautics Board against the establishment of this service, Chicago and Southern said:

> "The overnight [standard-fare] service which C.&S. presently operates between [the same] cities can scarcely be termed 'luxurious.' The flights operate with DC-3 equipment, whereas Eastern's coach service will operate with DC-4's. The Chicago and Southern flights will carry but one stewardess, whereas Eastern's coach service presumably will have one steward. Chicago and Southern's flights like Eastern's, will depart late at night and will arrive in the early morning hours. Many of the C.&S. passengers, like Eastern's, will make on-line connections en route. Neither the C.&S. flights nor Eastern's will provide meal service. The reservation procedures applicable to the flights of both carriers are substantially identical.
>
> "In other words, there is no significant distinction between Chicago and Southern's overnight flights between its domestic terminals and the so-called 'aircoach' services which Eastern proposes to operate between the same cities. From the point of view of the passenger, the only distinction of significance will be the fare and the fact that the so-called 'coach' service will be operating with the larger, more commodious DC-4 equipment."

In such a situation, the affected carrier must compete to survive, and a chain reaction is begun which accelerates the downward trend in passenger fares over a wide area. If allowed to proceed unchecked, the eventual result must necessarily be a basic fare structure at the

[28] In March, 1950, Eastern operated an average of 2.3 extra sections in each direction per day on its New York-Miami nonstop coach schedule.

4-cent coach level, with possibly an overlay of limited "super-luxury" service at a premium rate.

This possibility is of course enthusiastically encouraged by the consuming public. The average traveler has a very limited appreciation of the important economic factors involved, and is naturally desirous of buying his transportation at "bargain" rates wherever possible. In recent months newspaper and magazine articles supporting the broadest extension of air coach operations have appeared with increasing frequency,[29] and the C.A.B. has received formal complaints from smaller cities not now receiving such service requesting that the airlines serving them be required to provide it.

Industry Not Ready for Basic 4-Cent Fare

Unfortunately, however, there is another side to the picture, and the fact is that the airline industry is far from ready for a basic 4-cent fare. For example, in 1949 the domestic passenger traffic of Eastern Airlines accounted for approximately $32,300,000 in revenue after direct flying costs, which was available for ground and indirect costs, and profits. Assuming a 4-cent yield on this traffic, however, it would have been necessary that Eastern carry a passenger volume of some 2½ billion passenger-miles, or an increase of over 150 *percent* over the actual 1949 volume of slightly less than a billion passenger-miles, to produce the same contribution to overhead. Some increase in load factors might be assumed, which would reduce direct costs, but, on the other hand, overhead would probably be at least doubled as a result of the tremendously increased volume, which would require the production of an additional 2 billion passenger-miles to meet, in turn increasing overhead, etc. The progression is almost geometric in character, and results in a passenger volume of very impressive proportions.

On the same basis, the domestic trunk-line system as a whole would have had to produce almost 12 billion passenger-miles in 1949 at a 4-cent yield to realize the same dollar amount after direct flying costs as was actually reported. Making no allowance whatever for increased overhead, this alone would require a volume increase of almost 100 percent.

The achievement of the passenger volume necessary for the airlines to hold their own under a 4-cent fare structure appears very problematical under present conditions. It is easy to be misled by travel figures into an assumption that there is an untapped potential for low-cost air service of almost unlimited proportions. Upon closer examination, however, the prospects are not quite so tremendous.

Potential Market for Low-Cost Air Service

In 1949 intercity air, rail and bus passenger travel amounted to about 57 billion passenger-miles. Surface travel is, on the whole, about

[29] See, *e.g.*, "Air Travel *Can* Be Inexpensive," Consumer Reports, June, 1950.

17 percent more circuitous than that via air, and after adjusting for this factor the total common-carrier passenger market in 1949 was approximately 50 billion air passenger-miles. Airline and pullman travel accounted for about 30 percent of this total, and it is the balance of 70 percent, or 35 billion passenger-miles, represented by rail coach and bus traffic that is usually cited as the great potential for air travel at coach rates.

It must be remembered, however, that the average journey by bus is under 50 miles in length, and by rail coach under 100 miles, as compared with over 400 miles via airline and pullman. Further, it is generally true that at the present time air travel offers little in the way of advantages to the traveler journeying a distance of less than 100 miles.[30] In addition, while a 4-cent airline fare would be competitive with rail-coach operations, its effect would be severely limited in competition with the present 2-cent bus fare level.

Taking all these factors into consideration, it is apparent that the potential air coach market represented by rail coach and bus travel is not the 35 billion passenger-miles it seems at first glance, but more probably is somewhere in the vicinity of 10 billion passenger-miles.

There are certain unknown elements to be considered, of course, such as newly generated travel and traffic diverted from private automobiles. But it seems clear that there is little prospect that the present market is of such proportions as to make possible the operation of air-coach services on other than a highly selective basis, except at the cost of drastically reduced net revenues, which under our present policy means proportionately increased government subsidies.

VI. Future Air Transport Pattern Development

The broader question, of course, involves the direction of future civil air transport policy. Are we to move toward the widest feasible development of commercial air service, supported by Federal funds to whatever extent necessary? Or is the policy to be more in line with the concept advanced by the Secretary of Commerce, which envisions the ultimate elimination of those air services which are not economically self-sufficient under free competitive conditions?

As was pointed out above, it seems clear that the expansion of air coach service to the point where, in effect, it amounts to a substantial lowering of the basic fare structure will result in a very greatly increased amount of Federal subsidy, if air service is to continue to be provided to the same extent as is now available. In such case not only will it be necessary to provide mail compensation to the trunk lines to the extent increases in traffic fail to make up for the lowered yield, which in itself will be of staggering proportions, but, since passengers are already being carried at a tremendous loss by all of the feeder

[30] See "Effective Community Air Traffic Potential," Civil Aeronautics Administration, Dept. of Commerce, June, 1950.

operators, any reduction in passenger revenues for these lines will come directly from the taxpayers' pockets.[31]

It is of course within the province of the Congress to provide governmental support on such a scale if it is deemed to be in the national interest. There is no question but that a general reduction in fares to the coach level would result in a great and rapid expansion in planes, equipment and personnel, and a consequent increase in military reserve value. It would, however, postpone for many years to come the likelihood that any sizable segment of the industry could achieve financial self-sufficiency, and for most of the carriers, result in permanent government subsidization.

On the other hand, the withdrawal of all Federal support, as suggested by the Secretary of Commerce, would, if accompanied by a general fare reduction to coach levels, result in the complete elimination of most of our present commercial air service. It would mean the wholesale disappearance of all of the feeder lines and many of our smaller trunks, and a drastic reduction in the services of those remaining. Even at present yield levels, the curtailment in operations would be most severe.

The extent of government financial support, which is in final analysis a subsidy to the users of air transport service, has received much critical attention during the past 2 years. Many responsible persons feel that the subsidy is already too high; others believe that a fair and objective appraisal will show that it is generally overstated. and in any case, entirely justified. As a result of the very considerable divergence of views, however, there has developed a quite general insistence that steps be taken to separate so-called "compensatory" mail pay and outright subsidy, in order that the extent of subsidy may be fairly appraised and its worth evaluated.

Such a task, if undertaken, promises to be complicated and time consuming. In an approach to the problem, however, Senator Edwin C. Johnson, Chairman of the Senate group currently investigating airline finances, has given a very interesting indication of the extent to which our present airline services fall short of economic self-sufficiency.

In testimony before the Senate Appropriations Committee on May 5, 1950, Senator Johnson presented the results of a preliminary examination of airline subsidies.[32] Using an approach which is based upon admittedly unrefined methods and formulas, but which superficially, at least, appears to be conservative, he concluded that for the fiscal year 1949, Federal mail payments to the domestic airlines represented some 26 million dollars of "compensatory" pay and 32 millions

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[31] There is presently pending before the C.A.B. an application by Bonanza Air Lines, a feeder carrier, to inaugurate coach-fare service between Reno and Las Vegas, Nevada.

[32] Interim Report on Separation of Air Mail Pay from Subsidy, 17 J. AIR L. & COM. 333 (1950).

of subsidy, and that the latter figure included government support, in varying amounts, of airline services to some 330 cities in the present system, or over 75 percent of our airline communities.

Present Air Services Heavily Dependent on Subsidy

Although, as Senator Johnson stated, these figures are only indicative and of limited value, they do serve to point up the extent to which our present air services are dependent upon government support for their existence. While no allocation formulas have as yet been developed by means of which the profitability of an individual station to an individual airline can be conclusively determined, it seems fair to state, upon the basis of such studies and expert opinions as are available, that at the very minimum fully one-half of our present airline stations do not pay their own way, even under present yields. Given a drastic fare reduction and the elimination of government support, our air transport system would shrink to a handful of routes between a score of our largest cities.

To elaborate a little further, let us examine an individual domestic airline system — for example, Trans World Airlines. TWA is one of our large transcontinental carriers, serving some 55 communities representing a fair cross section of our cities, from the large to the small. In 1949 it carried about 1,400,000 domestic passengers, and had nonmail revenues of some $58 million. With mail pay at the rate of 65.1 cents per ton-mile, net operating income was approximately $2.5 million.[33]

As is the case with all our airlines, a few heavily traveled segments produced sufficient profits to enable TWA to operate the rest of its system, and in its case, to provide a small overall margin of earnings. In other words, the "fat" supports the "lean."

Only a relative few of TWA's domestic route segments produced in 1949 a passenger traffic volume of as many as 20 passengers a day in each direction. A handful produced much more than that. But using that figure as a breaking point, and constructing a theoretical route pattern from the segments producing not less than that volume, we arrive at a system serving but *seven* of the 55 cities in TWA's present pattern. This system would extend from New York to San Francisco, and include the intermediate points of Pittsburgh, Chicago, St. Louis, Kansas City and Los Angeles. In 1949 the route segments included in this service pattern *produced approximately* 50 *percent* of TWA's total domestic nonmail revenues.

These are the routes which could probably be operated profitably on a freely competitive basis under a basic fare at the 4-cent coach

[33] Amounting to 2.24 cents per revenue ton-mile. A reduction of but 1 cent in the 1949 passenger yield of 5.68 cents would have changed this profit margin into a loss of about 5.5 cents per revenue ton-mile. This underscores the extreme sensitivity of airline finances with respect to fare adjustments.

level. If TWA continued to operate the "lean" routes, it would soon die from attrition.

At present yields, a number of additional segments probably produce at least break-even revenues. For illustrative purposes, let us assume that these include all segments producing as many as 5 passengers in each direction per day during 1949. This would add some 18 additional cities to our theoretical routes, making a system total of 25 points.

This leaves 30 of TWA's present cities from which their service would be withdrawn under the freely competitive air transport system suggested by the Secretary of Commerce. These points are undoubtedly served at a loss by TWA under present passenger fares, and they receive air service only as a result of the government-aided public utility concept of the airline industry.

What is true of an individual airline is true of the air transport system as a whole. A large proportion of our present service is made possible only through government support and regulation. Even at present yields the cost of that support is not small, but progress toward self-sufficiency has been made, and under sound regulatory policies will continue. But if the trend toward coach fares is allowed to grow unchecked to the point where the basic fare structure is substantially reduced, then it seems clear that progress toward economic stability will be reversed, and government funds will be needed on a larger and longer basis if our airline system is to be maintained in its present form.

VII. Conclusion

We have not sought in this discussion to expound any theories or provide answers to any questions. The objective has been merely to suggest some of the problems presented by the so-called air coach service experiment, and if in some measure we have helped to focus thinking on these problems our purpose has been achieved.

One thing seems self-evident. If we are drifting into a long-term policy whereby, through government support, air transportation is to be permanently furnished to the user below cost, purely as a public service, then the taxpayers of the country should be clearly informed, to the end that they may determine whether the benefit is worth the expenditure involved. It should not be "just allowed to happen" as a result of so-called government experimentation.

THE LEGAL STATUS OF EXECUTIVE AGREEMENTS ON AIR TRANSPORTATION

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THE operating privileges in foreign countries which have made possible the development of a world-wide network of American-flag air transport services rest largely upon some forty bilateral air transport agreements between the Government of the United States and foreign governments.[1] The privileges of many foreign-flag air carriers to operate international services to the United States likewise depend upon the provisions of these agreements. Members of Congress and other persons have from time to time expressed the view that the validity or legal effect of these agreements is questionable, since they have all been made by executive authority without the advice and consent of the Senate requisite for the conclusion of a treaty.[2]

In a recent judicial proceeding, Colonial Airlines, Inc., a United States air carrier which is authorized to operate, *inter alia*, a scheduled air transport service between New York and Montreal, sought to enjoin the members of the Civil Aeronautics Board from holding hearings and having further proceedings on the application of Trans-

[1] Argentina, 1947, Department of State Press Release (cited *infra* as PR) No. 387; Australia, 1946, *Treaties and Other International Acts Series* (cited *infra* as TIAS) 1574; Austria, 1947, TIAS 1659; Belgium, 1946, TIAS 1515; Bolivia, 1948, PR No. 1030; Brazil, 1946, TIAS 1900; Burma, 1949, PR No. 740; Canada, 1939, *Executive Agreement Series* (cited *infra* as EAS) 159; 1945, EAS 457; 1949, TIAS 1934; Ceylon, 1948, TIAS 1714; Chile, 1947, TIAS 1905; Colombia, 1929, *U.S. Foreign Relations*, 1929, II, 882-884; China, 1946, TIAS 1609; Czechoslovakia, 1946, TIAS 1560; Denmark, 1944, EAS 430; Dominican Republic, 1949, TIAS 1935; Ecuador, 1947, TIAS 1606; Egypt, 1946, TIAS 1727; Finland, 1949, TIAS 1945; France, 1946, TIAS 1679; Greece, 1946, TIAS 1626; Iceland, 1945, EAS 463; India, 1946, TIAS 1586; Ireland, 1945, EAS 460; Israel, 1950 PR No. 623; Italy, 1948, TIAS 1902; Lebanon, 1946, TIAS 1632; New Zealand, 1946, TIAS 1573; Norway, 1945, EAS 482; Panama, 1949, TIAS 1932; Paraguay, 1947, TIAS 1753; Peru, 1946, TIAS 1587; Philippines, 1946, TIAS 1577; Portugal, 1945, EAS 050; Siam, 1947, TIAS 1607; Spain, 1944, EAS 432; Sweden, 1944, EAS 431; Switzerland, 1945, TIAS 1576; Syria, 1947, PR No. 384; Turkey, 1946, TIAS 1538; Union of South Africa, 1947, TIAS 1639; United Kingdom, 1946, TIAS 1507; Uruguay, 1946, PR No. 910; Venezuela, 1948 (text not published). Several of these agreements are not yet definitely in force; others have been amended (see *infra*, n. 85). Provisional agreements which do not accord reciprocal operating privileges to the other parties in the United States have also been made with Korea, 1949, TIAS 1979; Yugoslavia, 1949, 22 Department of State Bulletin 63; Iran, Iraq, and Saudi Arabia (texts not published). The United States was a party to the multilateral Chicago Air Transport Agreement of 1944, EAS 488, until July 25, 1947. 15 Department of State Bulletin 236 (1946).

[2] See *infra*.

Canada Air Lines, a Canadian air carrier, for a competing service between the same two cities, and from issuing a permit for such service. Among the many grounds advanced by Colonial in support of its action was the alleged invalidity of the air transport agreement between the United States and Canada signed on June 4, 1949, in which the United States undertook to permit an airline designated by Canada to operate a service between Montreal and New York.[3] The United States District Court for the District of Columbia, sitting as a three-judge statutory court, found it unnecessary, in dismissing the complaint, to pass upon the validity of the agreement.[4] Colonial appealed to the Supreme Court, but shortly before the date of the hearing moved to dismiss its appeal.[5] The question of the validity and legal effect of air transport agreements thus remains judicially unresolved. In view of the importance of these agreements in the air commerce policy of the United States, their legal position merits some consideration.

Air transport agreements will be discussed here primarily with reference to one aspect common to most of them, namely the qualified undertaking on the part of the United States to permit foreign airlines designated by the other party to operate regularly scheduled commercial air transport services to the United States.[6] Questions which may be raised with respect to other aspects of the agreements, such as the provisions dealing with rates and customs duties, will not be considered here.

Two problems of the validity and effect of air transport agreements must be distinguished – the domestic and the international. An inter-

[3] TIAS 1934. See Complaint for Injunction, filed August 17, 1949, *Colonial Airlines, Inc.*, v. *Russell B. Adams et al.*, Transcript of Record, Supreme Court of the United States, October Term, 1949, No. 539, p. 33.

[4] 87 F. Supp. 242 (1949).

[5] *New York Times*, February 6, 1950, p. 41; appeal dismissed, 70 S. Ct. 490 (1950).

[6] For example, the pertinent parts of the 1949 agreement with Canada, TIAS 1934, are as follows:

Article 2: Each contracting party grants to the other contracting party the rights specified in this Agreement and the Annex thereto for the purpose of establishing the international air services therein described, whether such services be placed in operation immediately or at a later date at the option of the contracting party to whom the rights are granted.

Article 3: Any air service described in the Annex hereto may be placed in operation as soon as the contracting party to whom the rights have been granted has designated an airline or airlines to operate such service, and has so notified the other contracting party. Each contracting party reserves the right to withdraw at any time the designation of an airline and substitute the designation of another. The contracting party granting the rights shall, subject to Article 7 hereof, be bound to give, with a minimum of procedural delay, the appropriate operating permission to the airline or airlines concerned; provided that the airline or airlines so designated may be required to qualify before the competent aeronautical authorities of the contracting party granting the rights under the laws and regulations normally applied by those authorities before being permitted to engage in the operations contemplated by this Agreement; and provided that in areas of hostilities or of military occupation, or in areas affected thereby, such operation shall be subject to the approval of the competent military authorities.

Article 7: Notwithstanding the provisions of Article 10 of this Agreement, each contracting party reserves the right to withhold or revoke permission to exercise the rights specified in this Agreement and the Annex thereto by an airline designated by the other Contracting party in the event that it is

national agreement entered into on behalf of the United States in accordance with its constitutional law is normally valid and binding under international law, even though, as will be seen below, it may be unenforceable in the domestic law of the United States without legislative action. But it does not necessarily follow that an international agreement made by the President of the United States in excess of his powers under the constitutional law of the United States is not internationally binding on the United States, however devoid of legal force it may be domestically. The international legal effect of such an agreement is further discussed below. The more immediate problem of the legal position of air transport agreements under the constitutional and statutory law of the United States resolves itself into two questions: (a) What would be the legal position of these agreements in the absence of statutory law on the subject? (b) What is the effect, if any, of existing statutory law on their legal position? These questions cannot be answered without reference to the position in the constitutional law of the United States of executive agreements in general.

Executive Agreements in Constitutional Usage

"Executive agreements" is a term commonly used to designate international agreements made by the President of the United States without the advice and consent of the Senate given by the two-thirds majority requisite for the conclusion of a treaty under the Constitution. The power of the President to make such agreements with and without the authorization or approval of Congress has been recognized by the Supreme Court,[7] and has been exercised since the beginnings of national government. It has been the practice of Congress since 1792 to authorize by statute the making of executive agreements on a large variety of subjects.[8]

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not satisfied that substantial ownership and effective control of such airline are vested in nationals of the other contracting party, or in case of failure by such airline or the government designating such airline to comply with the laws and regulations referred to in Article 6 hereof, or otherwise to perform its obligations hereunder to fulfill the conditions under which the rights are granted in accordance with this Agreement and its Annex.

Annex, Section II: The Government of the United States of America grants to the Government of Canada the right to conduct, by one or more airlines of Canadian nationality designated by the latter country, the international air services specified in Schedule Two hereof.

[7] *B. Altman & Co.* v. *U.S.*, 224 U.S. 583 (1912); *U.S.* v. *Belmont*, 301 U.S. 324 (1937); *U.S.* v. *Pink*, 315 U.S. 203 (1942). See also *U.S.* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Cf. *Cotzhausen v. Nazro*, 107 U.S. 215 (1882), and comment thereon by Fraser, Sen. Doc. No. 244, 78th Cong., 2d sess., at 27-28; *Field* v. *Clark*, 143 U.S. 649 (1892).

[8] In 1890, Solicitor General William Howard Taft found that the practice of making postal agreements under the authority of Acts of Congress, without approval by the Senate as treaties, was a well-established constitutional usage. 19 Op. A. G. 513. In 1938 Congress recognized in general terms the existence of "international agreements other than treaties to which the United States is a party" by providing for their publication in the Statutes at Large. 52 Stat. 760, 1 U.S.C. §30. For similar but less clear language in previous enactments, see 28 Stat. 615 (1895) and 49 Stat. 1551 (1936). For extensive discussions of the position of executive agreements in the history and constitutional law of the United

The making of executive agreements is thus a constitutional usage of long standing which apparently rests upon the President's vast but ill-defined powers in the fields of foreign relations and national defense.[9] Neither the usage nor the decisions of courts, however, provide clear-cut guidance as to the *scope* of the executive agreement-making power. It is clear that the scope of the treaty-making power and the scope of the executive agreement-making power are not mutually exclusive. What may be properly accomplished by executive agreement may also be accomplished by treaty. The proposition, therefore, that a certain matter is a proper subject for a treaty does not necessarily lead to the conclusion that it is not a proper subject for an executive agreement. But it likewise does not necessarily follow that everything that may be accomplished by treaty may also be accomplished by executive agreement.

The scope of the executive agreement-making power has been the subject of continued and often bitter controversy. It has been argued, for example, that subjects which were customarily dealt with by treaties at the time of the adoption of the Constitution should continue to be so dealt with, since such must have been the intention of the Framers, while other subjects may perhaps be legitimately dealt with by executive agreement.[10] The fact that the Constitution absolutely forbids a State of the Union to enter into "any treaty," but permits it to enter into an "agreement or compact" with the consent of Congress[11] has been used, in conjunction with definitions of allegedly equivalent terms found in the works of Vattel, an eighteenth-century Swiss jurist whose writings were widely read in America, to imply that an executive agreement may not impose a continuing obligation on the United

States, see McClure, *International Executive Agreements* (1941); McDougal and Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 Yale L. J. 181 and 534 (1945); Borchard, *Opinion on the Question Whether the St. Lawrence Waterway and Power Project Can Be Concluded by Executive Agreement with Canada or Requires a Treaty* (Rev. ed., 1946). See also Levitan, "Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States," 35 Ill. L. Rev. 365 (1940); Simpson, "Legal Aspects of Executive Agreements," 24 Iowa L. Rev. 67 (1938); Borchard, in 53 Yale L. J. 664 (1944) and 54 Yale L. J. 616 (1945); *Constitutionality of St. Lawrence Legislation, Memorandum Submitted by the Department of State to a Subcommittee of the Committee on Foreign Relations, U.S. Senate, on S. Joint Res.* 104, Senate Committee Print, 79th Cong., 2d sess. (1946).

[9] The Supreme Court has spoken of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." Per Sutherland, J., in *U.S.* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Although perhaps not necessary to the decision of the case, this definition of the President's position is believed to represent the considered view of the Court and to express a well-established constitutional doctrine. See *U.S.* v. *Belmont* and *U.S.* v. *Pink*, supra n. 7. The Court also said that it had recognized, in previous decisions, that the power to make such international agreements as do not constitute treaties existed as inherently inseparable from the conception of nationality, and had "found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." *Id.* See, in general, Corwin, *The President: Office and Powers* (1948), 259 *et seq.*

[10] Fraser, *Treaties and Executive Agreements*, Sen. Doc. No. 244, 78th Cong., 2d Sess (1944).

[11] U.S. Constitution, Article I, Section 10.

States, but must be capable of performance by a single act.[12] In recent years, much broader interpretations of the executive agreement-making power have gained ground. One view is that the President, in the exercise of his plenary power in the field of foreign relations, may make valid executive agreements on any subject on which treaties may be made; and that the distinction, if any, between executive agreements and treaties is not one of the scope of the power to make them, but of their effect in domestic law.[13] Another and narrower view is that the executive agreement-making power, in the absence of statutory authority or approval, extends to all matters within the President's independent power of enforcement.[14]

It is not believed that any attempt to delimit rigidly the scope of the executive agreement-making power is likely to be successful or to result in a correct portrayal or prediction of actual practice. Some writers, while refusing to regard the executive agreement-making power as co-extensive with the treaty-making power, wisely refrain from attempting to define the scope of the former.[15] Particularly futile are attempts to circumscribe the present and future constitutional practice by subtle deductions, drawn from antiquarian research into the reading habits and hidden states of mind of the Framers in 1788, as to the "true" meaning of such terms as "treaty," "agreement" and "compact." It must ever be borne in mind that the Framers attempted to create an instrument of effective government, in contrast to the unworkable Articles of Confederation. And it was precisely in respect to such matters as interstate and foreign commerce, and foreign relations, that the Articles had proven to be most unworkable. The general purpose of the Framers was to establish a workable government for the Union, and any construction of the Constitution which is likely to defeat that

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[12] Borchard, *Opinion*, *supra* n. 8, at 44-49, citing Weinfeld, "What Did the Framers of the Federal Constitution Mean by 'Agreements or Compacts'?" 3 U. of Chi. L. Rev. 453 (1935-36). It is clear that no such restrictive meaning has been given in practice and court decisions to the term "compact" in inter-State relations. See the critical comments of McDougal and Lans, *supra* n. 8, at 226-238.

[13] McClure, *supra* n. 8, at 343; *cf.* McDougal and Lans, *supra* n. 8, at 246. It has been held that an executive agreement incidental to the recognition of a foreign government is "the supreme law of the land" in relation to inconsistent State law. *U.S.* v. *Pink*, 315 U.S. 203 (1942). See also, for later developments, Note in 48 Col. L. Rev. 890 (1948). Executive agreements authorized or implemented by Congressional action are believed to have the same binding effect as treaties in superseding inconsistent State laws. 40 Op. A. G. 469 (1946). It is doubted that an agreement made by the President can supersede or modify the operation of an Act of Congress, unless given effect by appropriate legislation. See *infra*. A treaty does supersede a prior inconsistent Act of Congress. *Cook* v. *U.S.*, 288 U.S. 102 (1933). But *cf. Watts* v. *U.S.*, 1 Wash. Terr. (N. S.) 288 (1870), where the court said *obiter* that an executive agreement with Great Britain, not approved or authorized by Congress, providing for joint military occupation of an island the title to which was in dispute between the two nations, could modify the operation of the Organic Act of the Territory of Washington as enacted by Congress.

[14] Wright, *The Control of American Foreign Relations* (1922). 237; Levitan, *supra* n. 8, at 394. *Cf.* the view expressed in 1926 by Under Secretary of State Grew, 5 Hackworth, *Digest of International Law*, 402; and Borchard, *Opinion*, *supra* n. 8, at 66. *Cf.* McDougal and Lans, *supra* n. 8, at 199, 202, 205.

[15] 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed., 1945), at 1416-1418.

purpose must be rejected. In this, indeed, has been the secret of the longevity of the Constitution. This view is far from novel; the Supreme Court has expressed it repeatedly, from the days of Marshall and Story to those of Stone. Thus, in 1816, Mr. Justice Story, speaking for the Court, said:

> The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself.[16]

Three years later, the same view was expressed by Chief Justice Marshall:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language . . . we must never forget that it is a *constitution* we are expounding.[17]
>
> The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. . . . This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means, by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.[18]

More than a century later, the Court, through Mr. Justice Stone, said:

> But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it

[16] *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816), at 326.
[17] *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), at 407.
[18] *Id.*, at 415.

> is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.[19]

It may be proper, therefore, to regard the executive agreement-making power as extending to all the occasions on which an international agreement is believed by the Chief Executive to be necessary in the national interest, but on which resort to the treaty-making procedure is impracticable or likely to render ineffective an established national policy. The test here suggested is the only one that adequately accounts for the variety of situations in which the President, with or without the approval of Congress, has resorted to the executive-agreement procedure.[20] It also accounts for the increasing frequency of resort to the executive-agreement method in recent years, with the growth of complexity in international affairs and of pressure of work in the Senate. Recent counts have yielded the following figures of treaties and executive agreements made since 1789:[21]

Period	*Treaties*	*Executive Agreements*
1789-1839	60	27
1839-1889	215	238
1889-1939	524	917
1939-1945	43	300

Of the last 100 instruments (in numerical order) published in the *Treaties and Other International Acts Series* in 1949, 94 were executive agreements and only 6 were treaties.[22] The treaty-making procedure involves several steps, the most time-consuming of which, in

[19] *U.S.* v. *Classic*, 313 U.S. 299 (1941), at 316. See, further, with specific reference to the commerce power (as example of a field in which constitutional practice has extended far beyond eighteenth-century needs), *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U.S. 1 (1877), at 9; *North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686 (1946), at 705. For non-judicial expressions of the same view, see Patterson, *Presidential Government in the United States* (1947), 7-14.

[20] It is of interest that the President, on his own authority, has made several agreements the performance of which required, or might have required, legislative action. Thus, the acquisition by executive agreement of the Horse Shoe Reef from Great Britain (Canada) in 1850 was conditional upon an undertaking to maintain, at the expense of the United States, a lighthouse, which could not be done without legislative action. 1 Malloy, *Treaties*, 663. In 1941, the President, by executive agreement, undertook the defense of Iceland without expense to Iceland and promised compensation for all damages occasioned to the inhabitants by the military activities of the United States. EAS 232. On the other hand, when the Chicago Interim Civil Aviation Agreement was accepted as an executive agreement, a reservation was made by the United States as to "constitutional processes" with respect to the obligation to share the expenses of the international organization which was to be set up under the agreement. EAS 487. No such reservation was attached to the Chicago International Civil Aviation Convention, subsequently ratified as a treaty, which contained a similar obligation. TIAS 1591.

[21] Borchard, *Opinion*, *supra* n. 8, at 50-51, and sources there cited.

[22] See list in Department of State, *Publications*, *January* 1, 1950 (Publication 3728), 32-40.

practice, is the consideration of a treaty in the Senate.[23] In contrast, an executive agreement may be made to come into force on the date of signature, if it requires no subsequent legislative action. The treaty-making procedure, therefore, may simply fail in cases where the national interest requires prompt action or where the subject-matter of the agreement makes frequent amendment necessary.

Even the proponents of a strict construction of the executive agreement-making power admit that its limits are not clear or inflexible, and that an historical test is necessary.[24] They express fear, however, that the power, unless strictly circumscribed, may lead to executive abuses.[25] It is believed that this fear, though not entirely unfounded, overlooks several cogent considerations. History indicates that hostile public opinion or determined Congressional opposition to agreements really deemed to be objectionable generally prevents the making of such agreements or leads to their early termination. This is true not only because Congress has the power of the purse, but also because the Chief Executive is not likely to conclude an executive agreement if there is danger of inconsistent action (or inaction) by Congress. Congressional opposition was at least partly responsible for the denunciation by the United States in 1946 of the Chicago Air Transport Agreement.[26]

It is not intended, however, to suggest that there may be no instances of improper use of the executive agreement-making power. The treaty clause of the Constitution is not meaningless. The Executive would be acting improperly if he attempted to commit the United States, perhaps irrevocably, to a major change in national policy by an international agreement made on his own authority, or if he entered into an agreement imposing on the United States an obligation which he knew, or had reason to believe, to be unenforceable. The difference between proper and improper uses of the executive agreement-making power is not to be sought, however, in fine-spun antiquarian distinc-

[23] For examples of delay in the Senate of treaties dealing with aviation matters, see *infra*.

[24] "As already observed, the Constitution neither provides a clear definition of the proper subject-matter of treaties nor provides for the existence, let alone the scope, of executive agreements. Time and circumstances, however, provide guidance on these questions. We know approximately what kind of questions have historically been embraced by each form and what therefore are their proper spheres." Borchard, *Opinion, supra* n. 8, at 65. Professor Borchard undertakes on his own authority to distinguish "good" from "bad" usage, and to characterize decisions of the Supreme Court as wrong. *Id.*, at 51, 76-78. Cf. the view expressed by John Bassett Moore in 1905 to the effect that the law of the Constitution was "not more to be found in the letter of that instrument than in the practice under it." Moore, "Treaties and Executive Agreements," 20 Pol. Sci. Q. 385 (1905), at 417.

[25] Borchard, *Opinion, supra* n. 8, at 55.

[26] The notice of denunciation was given on the day the Senate gave its advice and consent to the ratification of the Convention, July 25, 1946. 15 Department of State Bulletin 236 (1946); TIAS 1591 This action was preceded by lively criticism of the Agreement in the Senate. See *infra*.

tions, but in the needs of the nation; and it is to be given effect not by judicial, but by political procedures.[27]

However broad may be the scope of the executive agreement-making power, the effect of an executive agreement in the domestic law of the United States may well be susceptible of judicial limitation. Treaties, although they are said by the Constitution to be the supreme law of the land, may be denied operative effect as domestic law in the absence of implementing legislation.[28] They may be superseded, as domestic law, by subsequent inconsistent Acts of Congress.[29] There can be little doubt that executive agreements are subject to similar limitations as to effect. Furthermore, while a treaty, if self-executing, can supersede a prior inconsistent statute,[30] it is very doubtful whether an executive agreement, in the absence of appropriate legislation, will be given similar effect.[31]

Control of Foreign Aircraft in the Absence of Legislation

Until the enactment of the Air Commerce Act of 1926, admission of foreign aircraft into the United States was not regulated by statute. It is apparent, however, that the national interest might be adversely affected by the unregulated operation and landing of such aircraft in the United States. In the absence of statutory law, did the President have the power to control the entrance of foreign aircraft? And did he have the power to undertake by agreement with foreign states to admit aircraft of their nationality into the United States? These questions were not much discussed, and such practice as existed with respect to civil aircraft was not conclusive. Operation of aircraft of any kind in or across the Panama Canal Zone without written authorization from the Chief Executive of the Zone was prohibited by an Executive Order dated August 7, 1913.[32] In 1914 a Proclamation Relating to the Neutrality of the Panama Canal Zone forbade public or private aircraft of belligerent powers to be operated in or over the Zone.[33] From 1920 on, "air navigation between the United States and Canada was governed by informal arrangement, usually renewed every six months and made reciprocal in 1927." [34] There could hardly be any doubt of the exist-

[27] Cf. Wright, "The United States and International Agreements," 38 Am. J. Int. L. 341 (1944).

[28] See, *e.g.*, *Robertson* v. *General Electric Co.*, 32 F.(2) 495 (1929).

[29] See, *e.g.*, *The Head Money Cases*, 112 U.S. 580 (1884); *Chae Chan Ping* v. *U.S.*, 130 U.S. 581 (1889).

[30] *Cook* v. *U.S.*, 288 U.S. 102 (1933).

[31] Even the proponents of a broad construction of the executive agreement-making power do not claim such an effect for an executive agreement unsupported by Congressional action. McClure, *supra* n. 8, at 343; McDougal and Lans, *supra* n. 8, at 317. Cf. *supra* n. 13.

[32] Padelford, *The Panama Canal in Peace and War* (1943), 119, citing Exec. Order No. 1810, *Ex. O.*, 150.

[33] 38 Stat. 2039. See also Padelford, *supra* n. 32. at 129; and 4 Hackworth, *Digest of International Law*, 389.

[34] 4 Hackworth, *Digest of International Law*, 383. It is to be noted that the arrangement was apparently not reciprocal before the passage of the Air Commerce Act of 1926. It does not appear whether, during this period, the United States undertook to admit Canadian aircraft.

ence of such powers with respect to military aircraft. The President had long exercised the authority to grant or refuse admission to units of foreign military forces, and had made executive agreements providing for such admission.[35]

With respect to civil aircraft, the question of existence of such powers does not seem to have given rise to much controversy,[36] perhaps because there was no occasion for it. An historical parallel could be found in the exercise by the Presidents, in the absence of statutory authority, of control over the laying of cables, power lines, pipe lines and similar installations connecting the United States with foreign countries.[37] It is apparent that control over the operation of foreign aircraft within the United States is even more necessary in the national interest than control over cables, power lines and pipe lines. Aircraft are not only means of communication; they are also means of observation, and of transportation of passengers and goods. They may also be used as means of attack, or of training for attack. Considerations of national defense would suffice to justify the exercise by the President of control over the entrance and operation of foreign civil, as

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[35] See, e g., *Tucker* v. *Alexandroff*, 183 U.S. 424, 435 (1902), where the Supreme Court said: "While no act of Congress authorized the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States." See also the several agreements with Mexico concerning the pursuit of Indians across the border, made in 1882, 1883, 1884, 1885, 1890, 1892 and 1896, 1 Malloy, *Treaties*, 1144, 1145, 1157, 1158, 1162, 1170, 1174 and 1177; and Simpson, *supra* n. 8, at 81-82. For other instances see 2 Moore, *Digest of International Law*, 389-400, and 2 Hackworth, *Digest of International Law*, 304-306, 323-324, whence it appears that requests for admission of foreign military units have generally been referred to the authorities of the States through which the units were to pass, for acquiescence by such authorities. In 1923 the Department of State felt that for constitutional reasons similar acquiescence was "essential" for the admission of foreign military aircraft. *Id.*, 324-325; cf. 4 *id.* 386. The practice of referring the requests to State authorities for their acquiescence was probably founded on the constitutional guarantee (U.S. Constitution, Art. IV, Sec. 4) that the United States shall protect each State against invasion. It would seem to have no bearing on the admission of civil aircraft.

[36] The Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority dated October 18, 1939, in which the effectiveness of undertakings contained in air transport agreements was doubted on the ground of inconsistency with certain provisions in the Civil Aeronautics Act (see *infra*), conceded that in the absence of legislation "the President would have the power to make agreements with foreign countries relating to the access to this country of foreign aircraft," on the basis of "the general power of the Executive to prohibit physical contact with our territory in a manner prejudicial to the interests of the United States." See *infra*, n. 82.

[37] Control over the laying of submarine cables was intermittently exercised from 1869 until the Kellogg Act of 1921 (42 Stat. 8) expressly conferred the power of control on the President. With respect to foreign-owned cables it was never successfully challenged in the courts. 2 Moore, *Digest of International Law*, 452-466; *U.S.* v. *La Compagnie Francaise, etc.*, 77 Fed. 495 (1896); 22 Op, A.G. 13 (1898). With respect to a cable owned by a United States corporation with a Federal charter, the power was successfully challenged in the lower Federal courts, which held that the corporation had by statute a Federal franchise which the President was powerless to disregard. *U.S.* v. *Western Union Tel. Co.*, 272 Fed. 311 (1921); 272 Fed. 893 (1921). See, in general, 4 Hackworth, *Digest of International Law*, 247-256. On power lines, see the opinion of Attorney General McReynolds, 30 Op. A.G. 217 (1913), citing numerous previous opinions dealing with cable-laying; on pipe lines, see the opinion of Attorney General Cummings, 38 Op. A.G. 163 (1935). See also 4 Hackworth, *Digest of International Law*, 352-353.

well as military, aircraft. Broader considerations of national interest, such as the desirability of preventing monopoly practices and of gaining reciprocal privileges in foreign countries, could be invoked as additional grounds for the exercise of such control.[38] The silence of Congress could hardly be taken as indicating that it intended foreign aircraft to be free to operate in the United States without restrictions of any kind.[39]

The authority to make executive agreements by which the United States undertook to admit foreign aircraft could be regarded as incidental to the power to control the admission of such aircraft. But even if the view were taken that the President had no power to control the entrance of foreign civil aircraft, it could be argued that he had the authority to enter into an undertaking to admit such aircraft, since nothing in the existing law laid down a contrary policy or would have prevented the enforcement of such an undertaking.[39a] In either case, the enactment of inconsistent legislation by Congress would have in all probability made the agreements unenforceable, but would not have necessarily terminated them as international obligations of the United States.

The Air Commerce Act of 1926

The Air Commerce Act of 1926[40] empowered the Secretary of Commerce, by Section 6 (c), to authorize foreign non-military aircraft to be navigated in the United States, subject to the condition of reciprocity and the prohibition of cabotage, and provided in Section 6 (b) that such aircraft might be navigated in the United States only if so authorized. By Section 6 (a) the navigation of foreign military aircraft in the United States was made subject to the authorization of the Secretary of State.

The power of the Secretary of Commerce to authorize the navigation of foreign non-military aircraft was not made subject to judicial review, or to any set of procedural rules, or to a "fair hearing," and must be considered as an executive or administrative function.[41] Al-

[38] The policies of prevention of monopoly, preservation of opportunities for American-owned cables, and control over rates had been the motives for the President's assertion of power to control the laying of cables by foreign companies. See 2 Moore, *Digest of International Law*, at 455.

[39] Cf. the absence of statutory restrictions on the admission of foreign troops See *supra* n. 35.

[39a] The Executive had previously asserted authority to enter into international commitments which could be carried out within the framework of existing law. An example is the practice of making agreements on most-favored-nation treatment in the matter of customs duties in the absence of statutory authority but in conformity with legislative policy. See the agreement of 1923 with Brazil, 4 Trenwith, *Treaties*, 3969; and a discussion and list of such agreements in McClure, *supra* n. 8, at 174-176.

[40] 44 Stat. 568.

[41] The pertinent language of Section 6(c) of the Air Commerce Act as enacted was as follows: "If a foreign nation grants a similar privilege in respect of aircraft of the United States. and/or airmen serving in connection therewith, the Secretary of Commerce may authorize aircraft registered under the law of

though the extent to which an executive officer is subject to the control of the President in the performance of a statutory function is not clearly defined in American constitutional law,[42] it is believed that in the exercise of this power the Secretary of Commerce was bound to act consistently with the national policy as determined by the President in a matter so closely related to national defense and foreign relations.[43] This policy could be laid down by the President in an executive agreement. The condition of reciprocity prescribed by the Act strengthens this conclusion, since negotiations with a foreign country may be necessary to determine the existence of reciprocity, and an agreement may be the best means of assuring its maintenance.[44]

The practical construction of the Air Commerce Act of 1926 is indicated by the conclusion of executive agreements relating to the reciprocal admission of foreign non-military aircraft. In the period between 1926 and the enactment of the Civil Aeronautics Act of 1938, numerous air navigation agreements and a few air transport agreements were entered into by the action of the Executive. The air navigation agreements typically included reciprocal grants of privileges of transit, landing, and commerce for aircraft on non-scheduled flights.[45] An agreement with Colombia accomplished by exchange of notes on February 23, 1929,[46] provided that American commercial aircraft were to be allowed to fly and land along the coasts of Colombia, while Colombian commercial aircraft were to receive similar privileges along the coasts of the United States and in the Canal Zone. These privileges were not limited to non-scheduled operations. An arrangement between the United States, the United Kingdom, Ireland and Canada for regular trans-Atlantic services was negotiated in the course of diplomatic discussions which took place between 1935 and 1937. This arrangement, not embodied in any single document, has never been made

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the foreign nation and not a part of the armed forces thereof to be navigated in the United States . . ." It was held by the Attorney General that under Reorganization Plan No III (54 Stat. 1231) this power, not expressly mentioned in the Plan, devolved upon the Administrator of Civil Aeronautics, rather than upon the Civil Aeronautics Board, because it was essentially administrative. 40 Op. A.G. 136 (1941).

[42] See Corwin, *supra* n. 9, at 94-114, 148-149, and sources there cited.

[43] Although the reasons for the Secretary's decisions on particular applications were generally not made public, there are indications that considerations of national defense entered into the decisions in some cases. See statement of Clinton M. Hester, appearing for the Interdepartmental Committee on Civil Aviation, March 23, 1938, *Hearings on H.R.* 9738 before the House Committee on Interstate and Foreign Commerce, 75th Congress, 3d sess., at 148

[44] Reciprocity may, of course, be found to exist in the absence of agreement; nevertheless, it is significant that statutory authority to grant privileges to foreign nationals on the condition of reciprocity had been the basis for executive arrangements for reciprocal treatment with respect to such matters as copyright protection, trade marks, visa fees, tonnage duties, certificates of admeasurement of vessels, customs duties, ship load lines, and taxes on shipping income. McClure, *supra* n. 8, at 58 60, 79, 85, 153-154, 156, 163; 5 Hackworth, *Digest of International Law*, 413-414.

[45] These agreements are listed in 4 Hackworth. *Digest of International Law*, at 383-384.

[46] *U.S. Foreign Relations*, 1929, II, 882-884; see *Aerovias Nacionales de Colombia, S.A.*, 7 C.A.B. 149 (1946).

public in full, but was implemented by the issuance in April, 1937, of 15-year permits to Pan American Airways by the United Kingdom, Ireland and Canada, and to Imperial Airways by the United States, and has been repeatedly cited and applied in the decisions of the Civil Aeronautics Board, which has referred to it as an "exchange-of-notes agreement."[47]

Despite this consistent practice, the propriety of undertaking generally, by executive agreement, to admit the aircraft of a foreign nation was occasionally denied or doubted.[48] The needs of the nation prevailed over these doubts.

The Civil Aeronautics Act of 1938

The Civil Aeronautics Act of June 23, 1938,[49] passed after extended hearings held over a period of years on a number of bills for the regulation of commercial aviation, transferred from the Secretary of Commerce to the newly created Civil Aeronautics Authority the power to authorize the navigation in the United States of foreign non-military aircraft.[50] Far more important was the comprehensive provision, contained in Title IV, for the economic regulation of air transportation. By Section 402 a foreign air carrier was forbidden to engage in foreign air transportation (defined in Section 1 (21) as "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between . . . a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation") without a permit issued by the Civil Aeronautics Authority (Board).[51] The Board "is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the

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[47] See, e.g., *Pan American Airways Company (of Delaware)*, 1 C.A.A. 118 (1939); *Airways (Atlantic) Limited*, 2 C.A.B 181 (1940); *British Overseas Airways Corporation*, 2 C.A.B. 763 (1941). Cf. 4 Hackworth, *Digest of International Law*, 386. It has been stated by Mr. Stephen Latchford, Adviser on Air Law in the Department of State at that time, that Section 6(c) of the Air Commerce Act of 1926 was relied upon as authority for entering into the negotiations which culminated in this arrangement. 12 Department of State Bulletin 1104 (1945).

[48] *Semble*, an unreported opinion of the Attorney General, 1936, cited by Wiprud, "Some Aspects of Public International Air Law," 13 Geo. Wash L. Rev. 247, 267 (1945); see also the testimony of Clinton M. Hester on H.R. 9738, *infra*.

[49] 52 Stat. 973.

[50] Sec. 1107(i) of the Act, amending the Air Commerce Act of 1926, 44 Stat. 568. By Reorganization Plan No. III, transmitted to Congress on April 2, 1940, 54 Stat. 1231, as interpreted by the Attorney General, 40 Op. A.G. 136 (1941), this power was transferred to the Administrator of Civil Aeronautics, an official who reports to the Secretary of Commerce.

[51] Under Reorganization Plan No. IV, transmitted to Congress on April 11, 1940, 54 Stat. 1234, the regulatory powers of the Authority have been exercised by the Civil Aeronautics Board. For this reason, the term "Board" is used *infra* in place of "Authority."

public interest."[52] The Board must give public notice of an application for a permit, and must set it for public hearing.[53] By Section 2 the Board is directed to consider certain stated policies, "among other things," as being in the public interest.

Under Section 801 of the Act, the issuance and denial of, as well as other types of action by the Board with respect to, foreign air carrier permits issuable under Section 402 (except "grandfather" permits) are subject to the approval of the President. Orders of the Board in respect to foreign air carriers subject to the approval of the President under Section 801 are, by Section 1006 (a), exempted from judicial review. Section 802 directs the Secretary of State to "advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services."[54] By Section 1102 the Board is directed, *inter alia,* to exercise and perform its powers and duties under the Act "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries."

What is the impact of the Civil Aeronautics Act of 1938 upon the legal status of executive agreements on air transportation? The language of the Act is believed to justify the following conclusions:

(1) Congress did not in terms authorize the making of executive agreements.

(2) Congress recognized that there were, or could be, agreements other than treaties by which the United States assumed international obligations affecting air transportation, "including air routes and services," and that such agreements could be either bilateral or multilateral executive agreements. This conclusion follows from the use of the term "agreement" in addition to the terms "treaty" and "convention" in Section 1102, and from the use of the term "agreements" in Section 802, where it stands alone. The term "agreement" would be meaningless in Section 1102 if it included nothing in addition to the type of instruments described by the terms "treaty" and "convention." It may be noted, in this connection, that during the same session Congress provided by statute for the publication of "international agreements other than treaties" in the Statutes at Large.[55] The fact that in Section 802 the term "agreements" stands by itself, while in Section 1102 it accompanies the terms "treaty" and "convention," is strong evidence that Section 802 was designed to apply only to "agreements" as distinguished

[52] Section 402(b) of the Act (with the word "Board" substituted for "Authority"). Section 402(c), known as a "grandfather clause." exempted from the standards of Section 402(b) permits replacing those issued by the Secretary of Commerce under the Air Commerce Act of 1926 and in effect on May 14, 1938.

[53] Section 402(e) of the Act.

[54] The word "Board" is substituted for "Authority."

[55] See n. 8 *supra.*

from "treaties" and "conventions," and that the term "agreement" is not coextensive with the terms "treaty" and "convention." Such differentiated use of these terms in the same statute is virtually conclusive proof that the term "agreement" in Section 1102 is not meaningless.[56] It is highly improbable, moreover, that Congress in 1938 was unaware of the fact that the term "treaty" has been commonly used to designate an instrument submitted to the Senate for its approval under the treaty clause, as distinguished from an executive agreement. It follows that the term "agreement" was probably designed to describe, or to include, an executive agreement. The expression "any foreign country or foreign countries" in Section 1102 is a clear indication that both bilateral and multilateral agreements were contemplated.

(3) Congress did not attempt to limit the power asserted by the President to enter into executive agreements affecting air transportation, and to assume obligations by such agreements, but gave implied approval to this assertion of power in its full extent.

(4) The Board may not lawfully make an order under Section 402 which would be inconsistent with an obligation assumed by the United States in a valid executive agreement. If there is an obligation to issue a permit to a designated foreign air carrier, failure to do so would be a violation of the Board's statutory duty, even if the record, apart from the international agreement, would require a finding that the proposed service is not in the public interest, or that the applicant is not fit, willing, and able to perform such service. The statute makes compliance with an international obligation the overriding consideration on both of these issues. There is no ambiguity and no inconsistency in Section 402 and 1102 on this point. Section 1102 is a limitation on the powers of the Board under Section 402, but in no sense compels the Board to attempt the performance of two inconsistent tasks. There is, therefore, no room for application of artificial rules of construction, such as the rule that the more specific provision must prevail over the more general.[57] The argument that the application of Section 1102 would make the procedures prescribed in Section 402 useless is a far-fetched *reductio ad absurdum* that is not justified by the facts. It will be noted that the existing air transport agreements leave large areas of determination to the discretion of the authorities of the United States, by providing, for example, that the designated foreign airline must or may be required to qualify before the competent aeronautical authorities under applicable laws, and that one of the parties to the agreement may withhold a permit if it is not satisfied that the substantial ownership and effective control of the airline is vested in the nationals of the other party.[58] There may be room for the determination of the terms, conditions and dura-

[56] Cf. Latchford, in 12 Department of State Bulletin 1104, 1105 (1945).

[57] For an attempt to deprive Section 1102 of its meaning by the application of this rule see the Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority, dated October 18, 1939, *infra* n. 82.

[58] See, e.g., the terms of the agreement of June 4, 1949, between the United States and Canada, *supra* n. 6.

tion of the permit, and even for the interpretation of the agreement itself.[59] Even if no reservation of any discretionary powers were made in an agreement, a finding by the Board that the record, apart from the agreement, would not have justified the issuance of a permit might serve a useful purpose, as for example by inducing the President to take steps to abrogate or modify the agreement. Actually, in view of the powers of the President under Section 801, the value of the Board's findings is in any event merely advisory.

(5) Even in the absence of Section 1102, the sweeping powers lodged in the President by Section 801 would imply the power to make and carry out executive agreements containing undertakings to grant operating privileges to foreign airlines. It must be noted that the President, under Section 801, has the power to disapprove the *denial,* as well as the issuance, of a foreign air carrier permit. Such disapproval is apparently intended to operate as a direction to the Board to issue the permit. Otherwise the power of disapproval of the denial would be meaningless. This construction of Section 801 has been adopted by the Supreme Court with reference to the power of the President to disapprove the denial of certificates of public convenience and necessity under Section 401 to American applicants proposing to engage in overseas or foreign air transportation,[60] and has been consistently followed by the Board.[61] It applies *a fortiori* to decisions on applications for foreign air carrier permits which, by Section 1006 (a), are expressly exempt from judicial review. In exercising his powers under Section 801 the President is not bound by the record before the Board, but is free to turn for advice and confidential information anywhere he pleases, the Board being merely one of his advisers, whose recommendations are entitled to no particular weight. The President's powers are not quasi-judicial, but political, and were given to him as the organ best fitted to weigh policy considerations connected with the conduct of foreign relations and national defense of the United States.[62] Since the President is thus free to give effect to his own policy, regardless of the views of the Board, he has the power to enforce any international obligations that he may assume by an agreement. By implication, he is authorized to make such agreements as being within the general statutory policy of leaving

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[59] See, e.g., *Swedish Intercontinental Airlines* (*S.I.L.A.*), 6 C.A B. 631, 635-636 (1946); *Royal Dutch Airlines* (*KLM*), 6 C.A.B. 815 (1946); *Linea Aerea Taca de Venezuela, C.A.*, 7 C.A.B. 317. 320 (1946); *Servicos Aereos Cruzeiro do Sul, Ltda, Brazil—United States Service,* Serial E-3896, decided December 22, 1949, approved February 8, 1950, at 4-6.

[60] *Chicago & Southern Air Lines. Inc.,* v. *Waterman S.S. Corporation,* 333 U.S. 103 (1948). See also *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F.(2d) 810 (2d Cir., 1941).

[61] See, e.g., *American Airlines, Inc., Mexico City Operation,* 3 C.A.B. 415 (1942); *Additional Service to Latin America,* 6 C.A.B. 857 (1946); *"Skycruise" Case,* Orders E-2920, decided June 1, 1949, approved June 9, 1949.

[62] See, for statements made in the course of the legislative history of the Act, *Hearings on H.R.* 9738 before the House Committee on Interstate and Foreign Commerce, 75th Congress, 3d sess. at 36-40, 147-148; *Hearings on S.* 3760 before the Senate Committee on Interstate Commerce, 75th Congress, 3d sess., at 6-7; 83 *Congressional Record* 6726 (May 12, 1938).

final determination of the issues of the national interest and of the fitness, willingness and ability of an applicant to the discretion of the President. The question of undue prejudgment does not arise, since the President is not required to confine himself, in reaching the decision, to the record made before the Board, or to attach any particular weight to that record. The President, for instance, as the director of the nation's foreign relations, may determine that the national interest in general, and the promotion of American air transport interests in particular, requires the exchange of air transport operating privileges with foreign nations on either a bilateral or a multilateral basis, without regard to the economic and technical characteristics of particular routes or particular carriers. Subject to the condition of reciprocity laid down in Section 6 (c) of the Air Commerce Act of 1926, he may decide to grant operating privileges to a foreign air carrier as a gesture of friendship, or for political reasons entirely unconnected with air transportation, even though such privileges may cause losses to United States air carriers. In all such cases, adversely affected United States air carriers may be compensated for their losses, if necessary, by mail pay on a "need" basis under Section 406 of the Act.[63] Even in the absence of Section 801, the President's views of the public interest, presented to the Board through appropriate procedures, would be entitled to great, though perhaps not conclusive, weight, as the most authoritative and coordinated determination by the Executive branch of the Government of what the needs of the foreign policy and national defense of the United States require. Section 801 in effect gives conclusive weight to this determination.

(6) Either Section 801 or Section 1102, standing alone, would amply support the authority of the President to enter into executive agreements affecting air transportation, and would enable such agreements to be carried out within the framework of the Act. Taken together, and in the light of Section 802, they place this authority virtually beyond all doubt. Nevertheless, it may be noted that the President, unlike the Board, is not required by the statute to act consistently with the obligations assumed by the United States in an agreement. There is, therefore, a theoretical possibility of a conflict between the Board's statutory duty under Section 1102 not to make an order denying operating privileges to a foreign air carrier entitled to such privileges under an international agreement, and the Board's duty to follow the direction of the President in its actions with respect to such privileges, should the President direct the Board to act in violation of the obligations of the United States under the agreement.

(7) It is difficult to conceive of a situation in which the questions of the validity and effect of an executive agreement purporting to impose on the United States an obligation to grant operating privileges to a foreign air carrier could be raised as justiciable issues, in view of the

[63] See *Trans-Canada Air Lines, Montreal-New York Service*, C.A.B. Serial E-4019, decided March 14, 1950, approved March 29, 1950, at 13.

powers of the President under Section 801 and the exemption from judicial review of orders in respect to foreign air carrier permits, unless Section 801 were held to be invalid or a conflict were to arise between the Board acting under Section 1102 and the President acting under Section 801 — contingencies very unlikely to occur.

Although the conclusions here set forth seem to be justified by the language of the Act, as judicially construed, some doubts may conceivably persist as to what were the real intentions of Congress in passing the Act in 1938. In particular, did Congress actually contemplate the making of executive agreements under which the United States would be bound to grant operating privileges to foreign airlines? The reference to "air routes and services" in Section 802 would seem to indicate that such agreements were within the contemplation of Congress; but it might be urged that this expression was perhaps intended to refer merely to the establishment and maintenance of navigational facilities, weather services, traffic regulations, and the like. Is there anything in the legislative history of the Civil Aeronautics Act that throws light on the actual legislative intent?

(To Be Continued)

INTERNATIONAL

Department Editor: Joan H. Stacy*

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

THE COUNCIL

WHEN the ICAO Council convened for its eleventh session on June 22, 1950 it had five new members—Denmark, Italy, the Philippines, Venezuela and the Union of South Africa. These new members along with Argentina, Australia, Belgium, Brazil, Canada, Egypt, France, India, Iraq, Ireland, Mexico, The Netherlands, Portugal, the United Kingdom and the United States, which had been reelected at the June 1950 session of the Assembly, will occupy seats on the Council for the next three-year period. The Council proceeded to reelect Dr. Edward Warner as its President for the new term, thus continuing him in the post which he has held since the Provisional International Civil Aviation Organization (PICAO) was established in 1945.

One of the first steps taken by the new group of Council members was the approval of a course of action for interpreting three closely related articles of the Chicago Convention. Article 33 calls for recognition by all contracting States of each other's certificates of airworthiness and personnel licenses provided the requirements under which they are issued satisfy minimum ICAO standards. Articles 41 and 42 exempt aircraft and personnel certified or licensed in periods before or immediately following adoption of ICAO standards from the requirement of conforming with these standards. The Council agreed that any interpretations of the Convention should be made in the light of the needs of civil aviation and approved the following procedure:

"(1) that the Council decide on the basis of documentation to be prepared by the Secretariat what the Articles should mean in the light of knowledge and experience of the problems covered;
(2) that the Council check its conclusions as to what the Articles should mean with the Articles as they are in order to determine the extent to which the Articles fail to achieve their desired purposes and whether their wording will permit the desired interpretation;
(3) that the Council's conclusion on (1) and (2) above be communicated to the Contracting States for their comments; and
(4) that, in the light of the States' replies, a Council Resolution be prepared embodying a recommendation to States that they accept either
  (a) the Council's interpretations of the Articles, if the wording is found to permit satisfactory interpretations; or
  (b) if satisfactory interpretation is not possible, the Council's conclusions as to what the Articles should mean until such time as the Articles can be amended."

Replies from ICAO member States to a letter dispatched by the Secretary General in December 1949 had contained only a few requests for aviation assistance of the type which ICAO might offer under the United Nations Expanded Technical Assistance Program. Therefore, the Council directed the Secretary General to send another letter to contracting States drawing their attention to Assembly Resolution A4-20, which endorsed ICAO's cooperation in the UN program, and asking them to reply by October 1, 1950

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concerning technical assistance which they would need from the Organization or technicians and training facilities they would be prepared to furnish so that ICAO could carry out its program. The fifty-four States which had met at the United Nations Technical Assistance Conference June 12-14, 1950 had pledged approximately $20,000,000 to carry out the technical assistance program of the United Nations and its specialized agencies through December 31, 1951. ICAO will receive approximately $170,000 as its share of this amount.

Another important letter approved for dispatch to contracting States was that announcing that the Council would proceed on or after November 1, 1950 to appoint a successor to Dr. Albert Roper, Secretary General of the Organization. Dr. Roper, who has been Secretary General of ICAO and PICAO since 1945 and who was Secretary General of the prewar International Commission for Air Navigation (CINA), will retire early in 1951.

The first part of the eleventh session of the Council ended on June 29, 1950. During the summer recess the ICAO Secretary General inquired of the United Nations Secretary General whether there was anything ICAO might do to assist the United Nations in suppressing aggression in Korea, particularly in view of Article 64 of the Chicago Convention, which provides that:

> "The Organization may, with respect to air matters within its competence directly affecting world security, by vote of the Assembly enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace."

and Article VII of the basic agreement between the UN and ICAO, which provides that:

> "The International Civil Aviation Organization agrees to cooperate with the Economic and Social Council in furnishing such information and rendering such assistance to the Security Council as that Council may request, including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security."

A negative reply was received from the UN since what was needed in the Korean situation was either immediate military assistance or aid in rehabilitating civilian refugees, a job in which two other specialized agencies of the United Nations—the International Refugee Organization and the World Health Organization are cooperating with the Unified Command.

When the Council reconvened on September 27, it elected the following officers:

First Vice President—Rear Admiral Paul A. Smith (U.S.A.)
Second Vice President—Colonel Humberto Delgado (Portugal)
Third Vice President—Dr. F. Duarte de Oliveira (Brazil)

All eight candidates for the Air Navigation Commission—Argentina, Brazil, Canada, France, The Netherlands, Norway, the United Kingdom, and the United States—were unanimously elected by the Council, and Dr. Walter Binaghi was unanimously reelected as chairman. Twelve of the fifteen nominees were elected to the Air Transport Committee. The States elected were Argentina, Australia, Canada, Denmark, France, India, Iraq, Mexico, The Netherlands, Portugal, the United Kingdom and the United States. Dr. Copes van Hasselt of The Netherlands was unanimously elected chairman of the Committee. Nine Council member States were selected to serve on the Joint Support and Finance Committees. Mr. Henri Bouche, the Council Representative from France, was chosen as chairman of the Joint Support Committee. The Finance Committee selected Brigadier C. S. Booth of Canada as its chairman.

Early in its fall 1950 session, the ICAO Council decided to accept the offer of Switzerland, one of the States operating international air services across the North Atlantic which has not yet acceded to the arrangements and agreements concerning the North Atlantic air safety services,[1] to contribute 200,000 Swiss francs as its share of the costs of these arrangements for the calendar year 1950. Switzerland had also stated that it would be glad to receive the Council's suggestions regarding its contributions to these services for 1951. In accepting Switzerland's proposal, the Council pointed out that it would be highly desirable for that Government to become a party to the North Atlantic safety service agreements at the earliest possible date in order that all user nations might share the costs on an equal basis.

The Council also decided to grant the request of the Allied High Commission for Germany that its Civil Aviation Board be given observer status at ICAO meetings concerning the European-Mediterranean region and special technical meetings affecting civil aviation in Germany. Although Germany and Japan participate in the activities of other specialized agencies of the United Nations, this is the first arrangement made for participation of one of them in ICAO. In this case, of course, it is the Allied High Commission and not the German Government which will be represented at certain ICAO meetings.

Air Navigation Matters

The 11th Annex to the Chicago Convention, Air Traffic Services, became effective on October 1, 1950. This annex contains standards and recommended practices for air traffic control, flight information service and alerting service. It constitutes the basic framework for obtaining worldwide uniformity in air traffic services. Contracting States must notify the Council by December 1, 1950 of their disapproval of any part of Annex 12, Standards and Recommended Practices for Search and Rescue. All parts of this annex which are not disapproved by a majority of contracting States will become effective on December 1.[2]

At the suggestion of the Air Navigation Bureau, the Supplementary Procedures for Air Navigation Services, covering regional variations from ICAO procedures, have been consolidated into a single publication. By bringing together similar material contained in the separate publications covering each of the 10 air navigation regions, the ICAO Secretariat has been able to produce a handier and less expensive volume.

With the approval by the Council of the draft frequency assignment plans prepared by the Secretariat for the Pacific and North Atlantic regions and the approval by the President of the Council, under delegated authority, of the recommendations of the European-Mediterranean Frequency Assignment Planning Meeting,[3] ICAO's work on preparation of draft frequency assignment plans for the international aeronautical mobile route services was completed. These plans will be submitted to the International Telecommunication Union's Extraordinary Administrative Radio Conference, which was postponed but is now scheduled to be held in the summer of 1951.

On the recommendation of the Air Navigation Commission, the Council approved the final report of the Third Session of the Meteorological Divi-

[1] Vik Loran services in Iceland, other air navigation services in Iceland, air navigation services in Greenland and the Faroes and North Atlantc ocean weather stations.

[2] Amendments Nos. 1-123 of Annex 1 on Personnel Licensing became effective on September 1, 1950, and amendments No. 124-128 are scheduled to come into effect on November 1, 1950. Amendments Nos. 1-63 of Annex 8 on Airworthiness of Aircraft will become effective on January 1, 1951.

[3] Held in Paris, France, June 6-26, 1950.

sion [4] and the dates, sites and agenda for the following additional technical conferences to handle regional, standardization and other technical problems:

Second Middle East Regional Air Navigation Meeting	Istanbul—October 17, 1950
Special meteorological meetings for the African-Indian Ocean, European-Mediterranean and North Atlantic Regions	Paris—November 8, 15, and 22, 1950
Rules of the Air and Air Traffic Control Division, 4th Session	Montreal—November 14, 1950

The fourth sessions of the Airworthiness and Operations Divisions, which are scheduled to be convened in Montreal early in 1951, will have before them for consideration recommendations concerning climb performance standards made by the Special Airworthiness/Operations Meeting held in Paris in September 1950.

A working group of the Air Navigation Commission has been appointed to study the problem of correcting the most serious deficiencies in air navigation facilities and services throughout the world. The Secretariat's detailed studies of air navigation facilities and services by regions have revealed that many facilities and services essential to international air navigation are still lacking. Another working group has been established to study the problems of consolidating certain of the ten ICAO air navigation regions.

Legal and Other Matters

Mexico had deposited its instrument of ratification to the Convention on International Recognition of Rights in Aircraft on April 5, 1950 but had made the following reservations:

> "The Mexican Government expressly reserves the rights belonging to it to recognize the priorities granted by Mexican laws to fiscal claims and claims arising out of work contracts over any other claims. Therefore, the priorities referred to in the Convention on the International Recognition of Rights in Aircraft, signed at Geneva, shall be subject, within the national territory, to the priorities accorded by Mexican laws to fiscal claims and claims arising out of work contracts."

Since the United States had previously deposited its instrument of ratification, the Convention would have entered into force as between the United States and Mexico on July 4, 1950, pursuant to Article XX of the Convention. However, the United States notified ICAO that it considered the reservation attached by Mexico to its ratification to be in the nature of an amendment which would vitiate the provisions of the Convention and that for this reason it was unable to accept the reservation of Mexico.

The fourth ICAO trainee program began on September 18, 1950. Officials of Burma, Indonesia,[5] Iran,[6] Italy, Lebanon and Pakistan will spend three months at ICAO headquarters in Montreal in the various parts of the Secretariat so that when they return home they will be of greater assistance to their governments in carrying out the work of ICAO.

Additional ICAO Statistical Summaries are now obtainable from the Secretary General at Montreal. Statistical Summary No. 8 and its addendum

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[4] Held in Paris, France, February 14-March 25, 1950.

[5] Indonesia adhered to the Chicago Convention on April 27, 1950, becoming a member of ICAO on May 27, 1950.

[6] Iran ratified the Chicago Convention on April 19, 1950, becoming a member of ICAO on May 19, 1950.

sheets issued monthly since January 1950 [7] are divided into two parts. The first part gives total figures (by months and by years) for both domestic and international airline operations of each country. The second part gives statistics on the operations of individual international airlines. ICAO Statistical Summary No. 9 [8] contains financial data and statistical analyses covering the financial year 1948 of 35 airlines registered in eighteen different States. It represents an improvement over Statistical Summary No. 6,[9] which contains financial statistics for the financial year 1947, in that the airlines of more States are represented and in that some idea of the way in which international airlines' finances are changing is given by a comparison of 1947 and 1948 operating expenses and revenues. ICAO Statistical Summary No. 11,[10] Fleet-Personnel 1948, is the second of its type issued by ICAO and contains data on aircraft fleets and personnel of 35 international airlines registered in 17 different States.

JOAN H. STACY

[7] ICAO Doc. 6958-AT/699, January 1950. The monthly addenda contain additional data received by ICAO the previous month.
[8] ICAO Doc. 6996-AT/701, July 1950.
[9] ICAO Doc. 6915-AT/697, October 1949.
[10] ICAO Doc. 7027-AT/704, August 1950.

FEDERAL

Department Editor: Charles T. Lloyd*

IDENTIFICATION OF AIR MAIL SUBSIDY AND ITS EFFECT ON AIRLINE COMMUNITIES**

ADDRESS BY EDWARD C. SWEENEY†

OUR 16 domestic trunk and 17 operating feeder airlines today link over 600 metropolitan and smaller cities by a complex air service network which provides this country with the finest commercial air transportation system anywhere in the world. These carriers render frequent, fast, air passenger, cargo and mail services which dissolve distances and tie our widely separated communities together in a manner essential to our modern commercial enterprises and military preparedness. The U.S.-flag international carriers render the same service to all accessible countries of the world.

This great air transportation system could not have been brought to its present development without the energetic management of the private airlines themselves, both certificated and otherwise. It has also been due to the support of the American taxpayer provided by the farsighted policies adopted by the Congress in passing the Civil Aeronautics Act of 1938. In addition to the provision of air navigation facilities, the 1938 Act recognized the quasi-public character of certificated air service, and authorized the payment of direct, albeit concealed, Federal aid through air mail payments.

The Civil Aeronautics Board has interpreted the 1938 Act to authorize it to fix air mail pay at amounts sufficient to meet the legitimate financial needs of the certificated air carriers, provided they operate with economy and efficiency. In brief, the Board has taken the total recognized expenses of each carrier, plus a fair return on investment, and subtracted commercial revenues. The resulting deficit or "need," past or future, has then been fixed as the proper air mail payment.

While everyone appreciates the importance of this great air transportation system both in peace and in times of a national emergency, some members of Congress have questioned the increasing expense to the Federal Treasury of this "cost-plus" policy. While the airlines have reduced the unit cost of carrying mail since 1941, notwithstanding general price increases, a rapid and alarming increase in total mail pay took place immediately after the war. For the fiscal year 1946, mail payments to our domestic, international, and territorial carriers, including Alaska, totaled $44.2 million. This sum increased to $117.2 million for services rendered in the fiscal year 1949, and an estimated $119.3 million for the year ended last June 30.

During these same postwar years more mail was carried to more cities and, with airline costs soaring, the unit cost to the Post Office Department

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*Executive Secretariat, Department of State.

**Revised paper delivered before Annual Convention of National Association of State Aviation Officials at Minneapolis, Minn., October 3, 1950. This paper elaborates the article by Senator Edwin C. Johnson, "Proposed Senate Action on Air Mail Subsidies." 17 J. A. LAW & COM. 253 (1950).

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also advanced. Even for the established carriers the unit mail rate more than doubled, although never approaching the prewar rate, in terms of the ton-mile yardstick. The average yield from mail to the 16 domestic trunk carriers rose from 55 cents to $1.17 per mail ton-mile between the fiscal years 1946 and 1949.[1]

What Is Subsidy?

At the outset it should be evident that the entire air mail bill is not a subsidy. The domestic airlines rendered a valuable postal service in carrying over 41,000,000 ton-miles of mail in 1949. There is no dispute that they should be paid a just and reasonable amount covering the cost of rendering this service. However, the initial vexing difficulty in the air mail subsidy problem is that no one in authority has advanced a satisfactory method of determining a fair compensatory air mail rate.

During the last few years, when various committees of the Congress asked specifically how much of the air mail pay was earned by the carriers and how much was subsidy to meet their over-all financial needs, they were told that the Civil Aeronautics Act of 1938 did not require the Civil Aeronautics Board to separate subsidy from compensatory mail pay. The Civil Aeronautics Board has always had authority to make this separation, but in its discretion has not done so. Last year, the Chairman testified that the Board was not in a position to do so until it could secure a special appropriation to conduct extensive preliminary studies. Estimates were made before the Senate Committee that the subsidy portion of total air mail pay ranged between 40 and 60 per cent. To some, this official position of the Board appeared like holding back from the public vital information which the Congress was entitled to have to judge the wisdom of the public expenditures involved. It gave competing forms of transportation a powerful propaganda tool.

The increasing demands for deficiency appropriations to cover the higher mail pay authorized by the Board continually brought the apparent mounting airline subsidies to the attention of Congress. This was intensified by the supporters of the Hoover Commission's recommendation to separate air mail pay from subsidy in the interest primarily of more rational postal accounting. The questions asked in Congress indicated that the members did not understand why, at a time when the air transport industry was enjoying phenomenal growth, with improved fast equipment, greater safety, and greatly increased passenger and cargo traffic, there should be need for greater public support. The answers were not convincing or satisfying.

Johnson Committee Investigation

Shortly after Senator Johnson of Colorado took over the Chairmanship of the Senate Interstate and Foreign Commerce Committee of the 81st Congress, he sponsored Senate Resolution 50, calling for an investigation of the operational efficiency and financial stability of the entire airline industry, as well as pending and equally grave problems affecting land and water forms of transportation. At that time many had suggested that the seeming uncontrolled expansion of air service following the war and the near financial collapse of some carriers was the fault of airline managements and the policies of the Civil Aeronautics Board.

As a result of these hearings in 1949, lasting over three months, at which witnesses from all branches of Government and industry testified, the need to find a method of establishing essential airline subsidies in a manner that

[1] See appended Table of Air Mail Payments, 1940-1950.

would be understandable to the Congress emerged as a foremost economic issue confronting the Senate Committee with respect to its responsibilities to air transportation. The need to separate fairly and intelligently compensatory mail pay from subsidy is an essential adjunct.

The President of the United States has shown the same concern toward airline subsidies when he stated in his Budget Message in January 1950:

> "The recent rise in total air-mail payments—to an estimated level of about $125,000,000 in 1950—has made it increasingly important that the subsidy element be separately identified. I recommend, therefore, the immediate enactment of legislation to authorize the separation of subsidy payments from mail compensation."

The potential importance of the subsidy identification issue can perhaps be emphasized by mentioning that the U.S. certificated air mail carriers of all classes have on file with the Board petitions for increases in mail pay amounting to $229 million for the calendar years 1944 through 1950.[2] This sum is over and above that which they had been paid up to May, 1950. It is doubtful if anyone believes that the carriers will be able to prove to the Civil Aeronautics Board the need for anything near $229 million additional pay for services already rendered. But this contingent pending liability highlights the gigantic task and the large sums involved in disposing of the pending mail rate proceedings by the Civil Aeronautics Board. Judging in restrospect the economy and efficiency of each airline's operations in order to find its over-all financial needs is an essential part of each mail rate proceeding. It is a back-breaking task and accounts in part for the mounting backlog of undisposed mail rate cases for which the House Appropriations Committee this year severely criticized the Board.

Cost Methods of Fixing Mail Pay

Only a few "die-hards" in the aviation industry would probably still contend that some part of the $119.3 million paid to all classes of certificated carriers during the past fiscal year was not in part a subsidy. However, some airlines, notably the "Big Four," urge that their share of mail pay contains no subsidy, and these carriers have received about 50 per cent of the domestic total. The CAB has called their current rates "service rates."

As the Post Office is the only customer, the mail rate cannot be set at its value to the Post Office in a free competitive market because the 1938 Act requires the Department to tender air mail to the certificated carriers and the latter to carry it at rates set by the CAB under conditions prescribed by the Department.

This highlights one of the most controversial issues in the entire subsidy problem; namely, the manner in which the *cost* of handling and transporting air mail should be determined in a service rate proceeding. Upon this issue the airline industry is divided, and government agencies and outside groups hold radically different views.

One view is reached if air mail is considered the primary service for which our entire airline industry is operated. In the early 1930's the mail service was so recognized by Congress. With such a premise one can logically contend that the entire operating cost of the airlines is a proper charge to the postal service, provided the passenger and cargo traffic pays its "added cost" and a little more, and thus reduces the cost to the Government below that of operating exclusive air mail planes.

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[2] Letters from Chairman, Civil Aeronautics Board, to Senator Edwin C. Johnson, May 16 and 18, 1950, Hearings on Departments of Commerce, etc., Appropriations for 1951 before the Subcommittee of the Senate Committee on Appropriations, 81st Congress, 2nd sess., Part 2, p. 1468.

A second view, vigorously advanced in some quarters, contend that mail, passenger and cargo services should be treated as co-equals, and that each of these services should share all joint or common expenses on the basis of some common denominator, such as the ton-miles of traffic carried. Our initial staff studies indicate that more than two-thirds (⅔) of total airline expenses constitute a true pool of common costs after all costs that can be identified directly or exclusively with the mail or one of the commercial services have been taken out. Such a unit allocation of joint costs in terms of units of traffic carried has been employed in many joint cost problems. However, when the full capacity of the aircraft is not used due to the limited commercial traffic potential and small mail poundage, regardless of the plane's size and schedule frequency, a traffic unit allocation of costs frequently produces "lopsided" and unpredictable results. The stand-by cost and value-of-service concepts have most appeal when the aircraft load factor is necessarily below the optimum consistent with adequate service.

A complete discussion of different views on cost methods requires the mention of another extreme treatment of the cost relationship between mail and the commercial services. This would be to treat the mail service on an added-cost or added-increment basis on the theory that the non-mail services now account for more than 85 per cent of the total tonnage carried. Apparently not even the Post Office Department suggests this treatment. These differing views on the cost of the mail service have one thing in common: they are all three "cost methods." It is a policy decision to decide which one should be employed, if any, and the purpose thereof in a compensatory mail rate determination.

It was in respect to these problems that one year ago the Senate Committee engaged the services of Ernst & Ernst, an independent firm of accountants and management engineers, to make a limited "pilot" study of the standards and techniques that might be used in actually determining what the rates of mail compensation should be. The report submitted, as of last February 1, presented in condensed form the extensive consideration that this firm of engineers gave to the various cost allocation and practical problems involved.[3] The report has been most helpful and provocative to those that studied it carefully.

House Committee's Action

The foregoing includes some of the cost problems that the House Interstate and Foreign Commerce Committee has apparently been wrestling with during this session of Congress in considering specific legislative proposals dealing with how the compensatory rate for the transportation of mail should be established. Recently the House Committee reported favorably the Heselton bill, H. R. 9184, by a vote of 15 to 2. This bill would require the earned mail rate to be based on cost alone. The Committee apparently did not accept the arguments presented by the airline industry with respect to the arbitrary character of all cost allocations or the historical use in transportation legislation of the value-of-service concept when subsidies have not also been involved.

Shortly before the recent recess of this session of Congress the Rules Committee of the House granted a rule to limit debate on the Heselton bill, and thus prepared the way for it to be called up on the Floor for vote. This was not done, but it may be called up without further procedure when the Congress returns on November 27. On the merits of H. R. 9184, or the

[3] See 17 J. Air L. & Com. 86 (1950).

merits of arguments against it, it would not be proper for me to comment at this time.

Senate Committee's Position

The Senate Committee has made it clear by its actions that consideration should first be given to finding a satisfactory method for establishing and justifying whatever subsidies the air carriers properly require. The remaining technical issues can be solved in ample time by the proper authorities, as well as the peculiar international problems affecting our U. S.-flag international carriers.

This is premised on the assumption that the taxpayer is ultimately more concerned with understanding the why and the wherefore of airline subsidies than in what is a precise constitutional and fair earned mail rate. No one has suggested that the Federal government should seek to drive a hard bargain with the airlines in fixing a mail rate. The Committee's staff preliminary studies make it clear that no matter how the mail rate is fixed, the present airline service to over 600 cities by 33 carriers cannot continue without substantial federal subsidies. The Senate Committee has set out to understand the reason for this.

National Defense Aspects

In attempting to find an understandable basis for airline subsidies, the Committee first turned its attention to the importance of our commercial airline system to the national defense. The Civil Aeronautics Act of 1938 directed the Board to consider the national defense as well as the postal and commercial needs of the country in establishing our subsidized air transportation system. Last year, at the request of the Chairman of the Senate Committee, the Defense Department made a thorough study over many months of the true value of civil aviation to national defense. On January 30, 1950, the Under Secretary of Defense testified before the Senate Committee that his Department would not be justified in underwriting in the Defense appropriation any portion of airline subsidies; that the airlines, like the railroads and trucks, were vital to our economy and the national defense, but no more vital, and that it would be impracticable to fix, in terms of dollars, the amount of airline subsidy that could justly be charged as national defense.

At that time the Committee questioned this official stand, and now, in view of the way that Department called on and promptly secured the charter services of both the scheduled and irregular air carriers for the Korean airlift, it appears completely unrealistic. It may again be proper to ask the present Secretaries of Defense and of the Air Force to re-examine this negative stand. However, notwithstanding the Committee members' private convictions, the Senate Committee felt compelled to accept the official position stated last January by the military and to proceed to look elsewhere for whatever justifications may exist for airline subsidies.

Short Haul Costly

Fortunately, the extended hearings held by the Senate Committee last year developed, perhaps unwittingly, what we now believe to be the fundamental justification of airline subsidies. An analysis of the testimony received revealed one common theme. It ran through the testimony of both airline industry and government witnesses. There was general agreement in their testimony that airlines carrying only long-haul business and serving

high-density cities could operate profitably without Federal subsidy. On the other hand, we were told time after time that route certificates requiring an airline to serve a large number of small cities with limited traffic potential and to carry predominantly short-haul traffic absorbed most of, and frequently all of, the profits earned by the long-haul high-density business.

The staff studies verified that this was the basic reason most subsidy is required; that the need for a subsidy increases almost directly in proportion to the number of poor traffic cities the airline must serve under its certificate of public convenience and necessity. Thus, the short-haul feeder lines operating over secondary traffic routes understandably have the greatest requirements for subsidy, while, on the other hand, the long-haul transcontinental carriers have the greatest opportunity to be free of subsidy requirements.

Unprofitable Cities the Basis of Subsidy

The varying traffic deficiencies and short-haul character of the different routes which individual carriers have been certificated by the Civil Aeronautics Board to serve is clearly the basis of this kind of subsidy. This is not necessarily a reflection on the companies' management. The need for this subsidy is not ultimately within the control of the airline itself. The airline is a quasi-public utility which renders a common carrier operation over fixed routes for a fair return which is subject to regulation by the CAB. The subsidy really benefits the passengers, cargo shippers and mail patrons of the cities certificated to enjoy airline service who do not, or cannot, pay the full cost thereof. In other words, for one reason or another, some cities served do not generate or attract sufficient revenue to pay for the service their citizens enjoy.

Our preliminary staff studies showed that airline service rendered to well over two-thirds of all domestic cities served during the fiscal year 1949 was provided at a loss. When management economy and efficiency under CAB's scrutiny was up to "par," we found that the subsidy need of each carrier came squarely from the services rendered to unprofitable cities which the carrier's route certificates require it to serve.

The Chairman of the Civil Aeronautics Board, in his testimony on February 15, 1950, before the House Subcommittee on Transportation, impliedly recognized the community need of airline subsidies when he stated:

> "Although paid to the carriers, this subsidy is not intended to aggrandize their profits; rather, it is paid to them so that they will be financially able to provide service to communities and localities which might not be able commercially, at least at the outset, to support a volume of service which initially may be in excess of the commercial demand for air transportation."

Interim Report of Senator Johnson

In May of this year, Senator Johnson, as Chairman of the Senate Committee on Interstate and Foreign Commerce, appeared before the Senate Appropriations Committee and presented an interim report on "Separation of Air-Mail Pay from Subsidy."[4] This report recommended that federal support to each airline system, over and above just compensation for carrying the mail, should be specifically identified on a community service basis, and that the Civil Aeronautics Board should identify and justify these amounts in an annual request to Congress for appropriations to pay them.

To demonstrate what Senator Johnson recommended in this interim report, he explained the basis of airline subsidies which has been described

[4] See 17 J. Air L. & Com. 333 (1950).

above. He also presented a tabulation of the amount of the subsidy each airline community contributed during the fiscal year 1949. The computation of the amount of subsidy by airline communities was constructed by the staff with a generous compensatory mail pay rate and with the most reasonable allocation of total airline revenues and expenses to the cities served that the staff could devise from the public records available. Neither the allocation formula nor the amount of subsidy by cities were intended to be final. They were to illustrate this new approach to the subsidy identification problem.

The Chairman's interim report also pointed out that in order to perfect a station cost formula to satisfactory accuracy, a staff of competent industrial engineers and accountants would have to make a thorough cost analysis of airline operations based on original field studies. The CAB Uniform System of Accounts and its Manual are inadequate and are not designed for this purpose.

Competent engineers must get behind the public records and make on-the-spot time and motion studies of airline operations and station activities. Payrolls and station activities must be checked to ascertain the employees and the expenditures that can properly be charged directly to each station served. Finally, the Chairman pointed out that the engineers must find acceptable methods of apportioning the remaining expenses and overhead of all categories over the stations of the entire system. This is a gigantic but perfectly feasible undertaking.

Proposed Engineering Survey of Station Costs and Subsidy

The Senate Appropriations Committee accepted Senator Johnson's suggestion for his Committee to direct such a survey or audit leading ultimately to legislation separating air mail pay from subsidy for both domestic and U. S. international carriers. As a result, the 1951 General Appropriation Act contains $200,000 for this purpose.

Interested parties were recently invited to submit bids to conduct such a survey covering domestic air carrier operations, including their international and overseas "stub" ends. Seven bids were received and after careful consideration and analysis of all the bids, Messrs. Ernst & Ernst were, on October 9, awarded the contract. A study covering international operations may logically follow when the Committee has considered the scope of the additional problems involved.

Bidders were instructed by the invitation to bid that the Committee would require them to develop the community approach to subsidy identification presented in the Chairman's interim report insofar as it related subsidy requirements to the losses incurred for the communities served. They were advised that they would not be expected to adopt any of the allocations used in the staff's study for the Chairman's interim report.

Ernst & Ernst will develop and report to the Committee the most accurate and practical techniques and methods of constructing profit and loss statements by individual airline stations which can be developed both through accounting and an engineering analyses of airline operations. This will include, as an appendage, the apportionment of an amount representing the rate of return on investment as found by the CAB. The final product will be the ultimate profitability of each station to the airline's system after payment of taxes.

Subsidy requirements would be allocated to the loss stations or developed from the station profit or loss statements. The importance of the small cities to the metropolitan hub as the origin and destination of a substantial portion of the latter's traffic is not to be overlooked in the contractor's study.

This will be considered in analyzing the proper cost and subsidy allocation formulas to be used in the station profit or loss statements.

The comprehensive field studies will include visits to the headquarters of each airline and to representative airline stations. On-the-spot analyses will be made by engineers, as required for the survey, of the records and operations at the headquarters and at stations of each of the 33 airlines to be surveyed. The invitation suggested the advisability of developing the station profit or loss statements by separate types of service. This has been found impracticable on a retroactive basis within the time available, and to make the engineering field studies fully productive, the contractor will develop, to the extent practicable through his field studies, ways of making such determinations in the future, giving particular attention to costs that can be directly identified through time checks with the separate types of traffic or services.

Finally, the contractor will recommend revisions in the CAB Manual of the Uniform System of Accounts insofar as this will help the preparation of the station profit or loss statements. His final report will represent revisions of the accounts, formulae and procedures to facilitate the annual preparation of profit and loss statements showing the ultimate profitability of individual airline stations and the identification of subsidy requirements in relation thereto.

Further, in order to give the Congress and the airline industry something concrete with which to judge the merits of the contractor's recommendations, he has been directed to prepare accurately individual profit or loss statements for the approximately 1,000 airline stations served during 1949, which statements would be based on the contractor's recommended methods. It is possible some detailed date may have to be estimated in order to meet the contract deadline of February 28, 1951.

So that this contractor would not dissipate his energies in trying to ascertain the precise cost of carrying the mail, the "Invitation Bid" listed certain compensatory mail rates to be used in this survey—60c,[5] 70c,[6] and $1.00[7] per mail ton-mile, with a minimum poundage prescribed for smaller carriers. This should not be construed to mean that the Committee has determined the proper compensatory mail rates. These rates were given solely to provide the proposed contractor with a necessary premise so that he could proceed directly with the tremendous task outlined for him.

Effect on Communities of Subsidy Identification

Senator Johnson has stated without equivocation that the community approach to subsidy identification he recommends does not provide that Federal subsidies should be paid by the cities. He has emphasized that the responsibility for underwriting whatever subsidy is found to be required will continue to be a Federal financial obligation, as it is the Federal government, acting through the Civil Aeronautics Board, that certificates the carriers and ultimately determines the adequacy of service over the routes.

It should be pointed out in this connection that this approach is premised on treating each airline as a separate operating system. This means that for cities enjoying airline service from more than one company, the profitability of each airline's service at that city must be determined separately. This has lead to some misunderstanding.

To be more concrete, take City X, which is an excellent traffic generating center, and assume, that City X is served by four certificated carriers during

[5] "Big Four"—AAL, EAL, TWA, UAL.
[6] BAL, CAP, C&S, DAL, NAL, NWA, WAL.
[7] CAL, CAI, INL, MCA, NEA, and the seventeen feeder lines.

the year in question. One carrier is a large transcontinental carrier and one a feeder line. Each of the four carriers connects City G with different metropolitan terminals and intermediate cities. The traffic potential of the routes of each carrier differ substantially. Assuming the adequacy of each carrier's schedules this difference is shown by the records filed with the CAB giving the traffic enplaned at City X, as follows:

Airline	*Passengers (Numbers)*	*Mail (Tons)*	*Cargo (Tons)*
A	120,000	800	1,000
B	69,000	200	400
C	18,000	85	300
D	7,000	12	13

Assume, further, that the recommended method for determining individual station profit or loss when applied to the operations of the four airlines at City X show three of the airlines earned a total of one milion dollars (Airlines A, B, and C), and the fourth carrier experienced a loss of $50,000 (Airline D). In this event, no attempt would be made to apply the profits of the three airlines to offset the loss of the fourth. This could not be done and preserve the integrity of each airline as an operating entity.

Consequently, the appropriation justification which the Civil Aeronautics Board would present to Congress would probably show the results of each company's operation at City X, or at least that of the carrier operating at a loss. Thus, unless other subsidy factors are introduced, the Civil Aeronautics Board would ask Congress for a subsidy to underwrite the loss experienced at City X by the fourth airline (Airline D) to the extent this loss of $50,000 was not offset by profits of the profitable cities served by this airline. Because of this offset balancing of the profits and losses at all cities served the request for subsidy for any city would ordinarily be for an amount less than the indicated station loss. In partial justification for a subsidy request, the enplaned volume of passengers, cargo and mail traffic could be presented.

The identification of the community subsidy requirement should not be construed as an adverse reflection on either the community or the airline but I would be less than frank if I did not recognize that such a presentation to Congress may contain implications which cannot now be foreseen.

Conclusion

It is the belief of the Chairman of the Senate Committee that when our contractor has devised a satisfactory method of distributing revenue and expenses of each airline to the communities served, the Congress will have done much to provide our vital and growing air transportation system with a sound financial basis.

The success of the survey will depend in a large measure upon the cooperation that each airline gives wholeheartedly to Ernst & Ernst and to the staff of the Committee. Every reasonable effort will be made to place the least possible burden upon the airlines' organizations.

If the system of identifying airline subsidies on a community basis is adopted, a sound air transportation system designed to meet the present and future needs of the commerce, postal service, and the national defense, can be developed with a clearer understanding of what the taxpayer is being asked to pay for. It will demonstrate to the public in a simple, understandable manner the nature and quantity of the air service patterns certificated by the Civil Aeronautics Board.

TABLE OF AIR MAIL PAYMENTS

Fiscal Year	*Total Mail Payments Domestic, International Feeder, and Territorial* [1] (000)	*Average Yield per Mail Ton-Mile* *Domestic Trunks*	*Feeders*	*Territorial*	*U.S. Intntl.*
1940	$ 31,813	$2.09 [2]	....	....	....
1941	36,257	1.88 [2]	....	....	....
1942	39,173	1.49	....	$4.26	....
1943	27,391	.78	....	1.73	....
1944	31,253	.65	....	.67	$1.48
1945	42,162	.57	....	1.35	2.26
1946	44,253	.55	$17.22	2.95	3.75
1947	55,922	.76	38.75	4.64	2.88
1948	94,533	1.12	41.66	4.00	3.16
1949	117,218	1.17	28.34	2.26	2.85
1950 (est.)	119,308	1.09	28.66	3.25	2.82
Calendar Year					
1940	32,145	1.99 [2]	....	....	....
1941	36,360	1.73 [2]	....	....	....
1942	31,228	1.09	....	2.28	....
1943	28,023	.66	....	.67	1.82
1944	37,917	.64	....	1.00	2.15
1945	42,180	.51	....	1.28	2.31
1946	46,201	.64	28.16	4.79	3.69
1947	73,192	.89	41.94	4.17	2.81
1948	113,378	1.27	32.88	3.53	3.03
1949	117,306	1.11	29.34	3.53	2.88

[1] Mail payments reflect retroactive adjustments resulting from CAB mail rate orders issued and accepted through September 15, 1950. Alaska carriers not included until 1943.

[2] Yield for all domestic carriers. Source: Civil Aeronautics Board.

1950 REPORT OF AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON AERONAUTICAL LAW

THE Standing Committee on Aeronautical Law herewith submits its Report for 1949-1950. The Committee membership was increased from 5 to 7 members and that of the Associate and Advisory Committee was similarly expanded during the current year. The Associate and Advisory Committee has continued to function generally as if it were a part of the Standing Committee.

ORGANIZATION OF CIVIL AVIATION AGENCIES[1]

In its last year's report the committee outlined briefly some of the outstanding recommendations of the Hoover Commission [2] on government organization of the civilian agencies dealing with aeronautics. Certain important organizational changes have been made.

In accordance with the recommendation of the Hoover Commission "that all administrative responsibility be vested in the Chairman of the Commission," the President, by authority of the Reorganization Act of 1949 (P. L. 109, 81st Cong., 1st Sess., June 20, 1949), submitted to the Congress Reorganization Plan No. 13 of 1950, dated March 13, 1950. (House Doc. 517, 81st Cong., 2nd Sess.) This Plan transferred from the Board to the Chairman of the Board (1) all of the executive and administrative functions of the

[1] See Sweeney, "Safety Regulations, etc.—Reorganization Plans of 1950," 17 J. AIR L. & COM. 269 (1950).

[2] See 17 J. AIR L. & COM. 99 (1950).

Board, including the hiring and dismissal of personnel, (2) the distribution of business among the personnel of the Board and among the administrative units of the Board, and (3) the use and expenditure of funds. In carrying out such functions, the Chairman is to be governed by "general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make." Also, the appointment by the chairman of the heads of major administrative units is subject to the approval of the Board. The Board may revise budget estimates and determine upon the distribution of appropriated funds "according to major programs and purposes." The chairman is authorized to delegate functions vested in him to any officer, employee, or administrative unit. This Plan is now in effect.

In carrying out (substantially) another recommendation of the Hoover Commission, Reorganization Plan No. 5 of 1950 (House Doc. No. 509, 81st Cong., 2d Sess.) transferred all of the functions of the Administrator of Civil Aeronautics to the Secretary of Commerce and authorized him to delegate these functions to any officer, agency, or employee of the Department of Commerce. This action was a part of the general program, embodied in several of the 21 Reorganization Plans sent to the Congress in March, 1950, of vesting in the head of the Department all of the functions lodged within the Department. Heretofore, certain important functions were by statute vested in the Administrator although by a previous Reorganization Plan No. IV (effective June 30, 1940, Pub. Res. 75, approved June 4, 1940) the functions of the Administrator "shall be administered under the direction and supervision of the Secretary of Commerce." This Plan is now in effect and the Secretary of Commerce has delegated to the Administrator (whose position was not abolished as the Hoover Commission recommended) the functions formerly vested in him so that the Plan has, as a practical matter, made no change up to now except to clarify the chain of authority.

Also in line with the Hoover Commission's Report, the President increased the role of the Department of Commerce in the field of transportation. The President in his Message to the Congress transmitting Reorganization Plan No. 21 of 1950 (House Document No. 503, 81st Cong., 2d Sess.) cited the Organic Act of the Department, passed in 1903, which provided that it "shall be the province and duty of said department to foster, promote, and develop . . . the transportation facilities of the United States . . ." (5 U.S.C.A. 596). By that Plan the functions of the Maritime Commission were transferred to the Department of Commerce; and the new office of "Under Secretary of Commerce for Transportation" was created. In the above-mentioned Message transmitting the Plan, the President states that it is his purpose to look to the Secretary of Commerce (who is to have the assistance of such Under Secretary) "for leadership, with respect to transportation problems and for the development of over-all transportation policy within the Executive Branch." This Plan is now in effect. And thus a first step has been taken toward effectuating Recommendation No. 12 of the Hoover Commission's Report on the Department of Commerce, submitted March 1, 1949, "that the Secretary of Commerce be assigned the duty of making over-all route programs for air, land, and water transportation . . ." has been substantially put in effect.

Separation of Subsidy from Compensatory Air-Mail Pay

This subject has become very active within the last year. Section 406 of the Civil Aeronautics Act of 1938 provides that the "need" of a carrier, with certain limitations, should be taken into consideration by the Civil Aeronautics Board in determining the rate of mail pay to be fixed. The President in his 1951 budget message to the Congress recommended the immediate

separation of "subsidy payments" from "mail compensation." (House Doc. 405, 81st Cong., 2d Sess.) The Hoover Commission's Report on the Post Office Department, submitted February 17, 1949, recommended separation; Governmental agencies, including the Department of Commerce, the Post Office Department, and the Civil Aeronautics Board have endorsed the broad principle of separation. (House Report No. 3041, 81st Cong., 2d Sess., 5). Different supporting reasons are involved for separation. It is urged that the taxpayer is entitled to know what is being paid as subsidy; that in this particular field the Post Office Department deficit should be reduced by the amount of subsidy (although, so far as is known, similar claims are not given much weight in fields where much larger subsidies in one form or another are borne by the mail service); and that by such separation air carriers will be given stimulus to get out of the subsidy class and become self sufficient.

Among those who embrace separation, there are two major divisions—those who believe that the separation should be made now by law if necessary and those who believe that the question, admittedly complex, should be studied. Perhaps, in the midst of uncertainties as to whether any of various Senate and House bills dealing with the matter will ever become law, the most realistic and tangible development is that in the General Appropriation Bill, 1951, H.R. 7786 (which has now been enacted into law) the sum of $200,000 has been appropriated for the Senate Interstate and Foreign Commerce Committee to survey certificated interstate, overseas and foreign air carrier operations "with a view to drafting legislation requiring the separation of mail compensation from any Federal subsidy payments . . . ."

When the philosophical discussion reaches the point of action, certain hard (but manageable) facts must be faced. No definition of subsidy has been—perhaps no one definition can be permanently—agreed upon. It could be defined as any amount received by an air carrier for the transportation of mail which exceeds a "fair and reasonable rate" for that transportation. This definition, of course, leaves all of the problems unanswered. Even if that definition were agreed upon, it still would be necessary in fixing a fair and reasonable rate to determine what weight should be given to the cost to the carrier of transporting the mail, to the value of the air carriers' services to the Postmaster General and to the public, and to the effect of the development of passenger and cargo revenue upon the cost of mail service to the government. In determining costs to the air carrier, it would be necessary to allocate costs among the various classes of traffic—a difficult process which has long plagued rate-making agencies.

Activities of the Johnson Committee

The Senate Committee on Interstate and Foreign Commerce, of which Senator Edwin C. Johnson of Colorado is Chairman, has taken leadership and has been continuously active in the field of air transportation since Senator Johnson became Chairman at the commencement of the 81st Congress.

Under Senate Resolution 50 (81st Cong., 1st Sess.) the Johnson Committee exhaustively investigated the operational efficiency and the financial stability of the entire airline industry. Hearings, begun on April 12, 1949, include the testimony of 79 witnesses. (Air-Line Industry Investigation, Hearings before the Committee on Interstate and Foreign Commerce, U. S. Senate, 81st Congress, 1st and 2d Sessions pursuant to S. Res. 50).

The Johnson Committee has taken a leading part in urging the separation of subsidy from the compensatory air-mail pay discussed above. It engaged the services of Ernst & Ernst who submitted a report as of Febru-

ary 1, 1950, on certain phases of the separation problem.[3] The committee undertook a study of airline "station" costs and on May 5, 1950, Senator Johnson presented to the Senate his "station" by "station" analysis of air-mail subsidy which, pursuant to a theory developed in the study, are required to support service to small cities on short hauls.[4] Senator Johnson recommended that government support to each airline over and above just compensation for the transportation of mail be specifically identified on a community service basis and be justified to Congress in the annual CAB request for an appropriation. Finally, the Johnson Committee has available the $200,000 mentioned above for a study of the air-mail subsidy problem. The committee is taking steps to let contracts to implement the above-mentioned recommendation.[5]

Trunk Line—Feeder Line Services

Great confusion surrounds the use of the words "trunk lines" and "feeder lines" as applied to domestic air carriers. Neither has ever been defined satisfactorily. Generally speaking, any carrier which was operating in 1938 when the Civil Aeronautics Act was passed is a "trunk line." The carriers which have been certificated during the past five years to provide local area services, are generally referred to as "feeder lines," although they may do but little "feeding" into trunk lines and although they conduct operations similar in many respects to local services conducted by many of the trunk lines.

Currently, one of the air transportation issues most discussed in the public press revolves around the question of whether long-haul high-density points (i.e., populous places which use air transportation extensively) should be segregated into one group of operators (Class I); and all other points assigned to another group (Class II).[6] Certain air carriers have voluntarily abandoned or suspended some light traffic points. (Abilene, Texas and Big Springs, Texas (American Airlines, Inc.), CAB Order Serial No. E-4585, September 1, 1950; Peoria, Illinois and Springfield, Illinois (Chicago & Southern Air Lines, Inc.), CAB Order Serial No. E-3488, October 27, 1949; and Green Bay, Wisconsin and Wausau, Wisconsin (Northwest Airlines, Inc.), CAB Order Serial No. E-4091, April 20, 1950). It is said that Class I could be self supporting even at fairly low rates; whereas Class II serving the thinly populated area could not. Subsidy is indicated here. The debate centers around the point, is this division good and in the public interest? Is it advisable to segregate profitable operations from unprofitable operations, so that the one will neither assist nor be dissipated by the other?

If a wise solution is to be achieved, some questions deserving careful consideration would seem to be: Will such a division promote air transportation effectively? Will the Class I operators who carry the bulk of the nation's air traffic volume be stronger financially under this arrangement? Will the higher cost of Class II operators be made up by subsidy or by rates paid by the public? Is it reasonable to expect that, if no such classification were made, the operator serving all of the points in an area would render adequate service to both heavy and light traffic points, or is it necessary to develop a special operator in order to secure adequate service to the light traffic points? Will the cost to the Class II user be higher than to the Class I

[3] See 17 J. Air L. & Com. 86 (1950).
[4] See 17 J. Air L. & Com. 333 (1950).
[5] See Johnson, "Proposed Senate Action on Air Mail Subsidies," 17 J. Air L. & Com. 253 (1950), and Sweeney, "Identification of Air Mail Subsidy and Its Effect on Airline Communities." 17 J. Air L. & Com. 459 (1950).
[6] See Lee, "The Planned Promotion of Feeder Air Transportation," 17 J. Air L. & Com. 347 (1950).

user? Will new industry be willing to settle in Class II points? In the long run, will this classification tend to encourage or discourage the availability of air transportation as a nationwide distribution system? Eventually, will this arrangement of having two classes of operators cost the public, including the taxpayer, more or less than would be the case if one operator were required to serve all of the points in his area? If this classification results in low rates to the public for Class 1 operators and high rates for Class II, what will be the position of other forms of transportation toward the matter?

CIVIL AERONAUTIC'S BOARD'S ECONOMIC PROGRAM FOR 1949

This program was referred to in the committee's report. The action of the Civil Aeronautics Board in announcing this program was not repeated in 1950. The program was a substantial one as onyone who has examined it will see. Lack of adequate staff and of a system of priorities in a work schedule assigning the elements of this program to a high position can be cited as cause of the fact that it is far from complete.

INTERNATIONAL AIR TRANSPORT AGREEMENTS

Under the United States' policy, no bilateral agreement which it has made with a foreign country pools or assigns capacity to be operated among the operators between the United States and such country. Most bilateral agreements provide for consultation on this problem between the governments upon request. The first of such consultations has taken place between the United States and Brazil during the past year. This problem of how much capacity the operators of the countries to a bilateral agreement shall operate may become a very important one.

No further action has been taken on the proposition of establishing a multilateral world-wide convention on air routes since the failure of the Multilateral Commission at the Geneva Conference in the Fall of 1947.

WARSAW CONVENTION

The reason why the committee was required to report upon a limited phase of the Warsaw Convention; the committee's action thereon; and the action of the House of Delegates at the Midyear Meeting are set forth in the Midyear Proceedings February 27 and 28, 1950.[7] This Warsaw Convention will not be further considered for some time by the Legal Committee of the ICAO. It has been assigned a priority position next below the Rome Convention and the Convention on Aerial Collisions.

ROME CONVENTION

During the past year the Rome Convention (dealing with the subject of liability for damage caused to third persons or property on the surface by aircraft operated internationally) has received a great deal of attention and now ranks first in priority upon the agenda of ICAO's Legal Committee which meets in its Seventh Session in the Winter of 1950-51 At the Sixth Session of this Committee held in Taormina, Sicily early in 1950, it was thought that a "final" draft of this Convention had been achieved.[8] However, the Legal Commission of the 1950 Assembly of ICAO devoted its entire session to further revision on this Convention.[9] As so revised, it has

[7] See "Resolution of ABA Urging Strict Liability and Increased Liability Limits in Revisions of Warsaw and Rome Conventions," 17 J. AIR L. & COM. 225 (1950).

[8] For complete text see 17 J. AIR L. & COM. 194 (1950).

[9] For revised text see 17 J. AIR L. & COM. 328 (1950).

been referred again to the Legal Committee with the hope that it may be finalized at the next ICAO Assembly. In the meantime, the current draft emanating from the above-mentioned Legal Commission is being circulated to the member states of ICAO for comments which are to be in by November 1, 1950.

The important definition of the term "operator" upon whom liability is imposed; the question of the appropriate system of liability (the Taormina articles including an element of liability based upon fault); the question of what courts should have jurisdiction to adjudicate claims under the Convention or to grant execution on judgments rendered by the courts of other states; and what provisions should be in the Convention concerning insurance, are important matters which are up for further consideration.

Convention on Aerial Collisions

Next to the revised Rome Convention, the matter considered to be of the greatest urgency on the work program of the Legal Committee is the revision of the draft Convention on Aerial Collisions. The committee has recognized that certain aspects of the problem of aerial collisions are so closely related to the problem of damage on the surface that it will be necessary to give some consideration to the former before finalizing a revised Rome Convention.

Legislation Dealing with Contracts Between the Government and Aircraft Manufacturers

The committee reported last year a difficult problem which the aircraft industry faced through the applicability of both the profit limitation provisions of the Vinson-Trammel Act of March 27, 1934, as amended (34 U.S.C 495) and the renegotiation provisions of the Renegotiation Act of 1948 (Section 3 of P. L. 547,80th Cong.). This question was eliminated by Section 622 of the National Military Establishment Approproation Act, 1950 (P. L. 434, 81st Cong.) which provided that all negotiated contracts would be subject to the provisions of the Renegotiation Act and would not be subject to the Vinson-Trammell Act. Following the expiration of the Appropriation Act on June 30, 1950, this provision was carried forward in Section 618 of the General Appropriation Act, 1951, signed by the President on September 6, 1950.

Prototype Aircraft Legislation

For several years the aviation industry and the government have been concerned with the problem of providing for the development of new and improved transport aircraft—a jet transport, a more economical cargo aircraft, and a feeder line aircraft. It has seemed reasonably clear that these aircraft could not be designed and built entirely on the basis of financing by the airline and the manufacturer. After more than a year of study, the Administration proposed legislation during the current session of Congress which would provide for an appropriation over a five-year period of $12,500,000 to provide for the testing and experimental modification of prototype transport aircraft. This testing would include the operation of an existing jet airplane in simulated scheduled transport service, in order to determine the operation, maintenance, and traffic control problems a jet would create—thus providing some guidance for the future design of new jet transport. This legislation, P. L. 867, was adopted during the present session.

Both aircraft manufacturers and air transport officials endorsed this legislation, but warned that while this modest program is a good first step,

it may not result in inspiring manufacturers to commit the millions of dollars necessary to develop a new transport. Airline officials have pointed out that unless some solution is found to this problem, it may be necessary for them to look to British and Canadian manufacturers for the jet transports they will need to maintain the development of our domestic air transport service and to meet foreign competition.

Cooperation with the United States Air Coordinating Committee

The Air Coordinating Committee (ACC) is the agency charged with developing the position of the United States on aviation questions involving several governmental agencies. The ACC has, throughout the past years, submitted numerous questions to the Committee on Aeronautical Law and to the Associate and Advisory Committee for comment and suggestion. All of these questions have been circulated among the members of the committee and each comment or suggestion received has been made available to the ACC, not as committee action but as the views of the individual member. We are advised by the ACC that this procedure is satisfactory and that the comments and suggestions are useful and are valued by the ACC. This procedure permits those members of the Aeronautical Law Committees who are alert to take advantage of this opportunity to make their views available in a manner permitting them to be effective. It is expected that this cooperative arrangement will continue.

Respectfully submitted,

Committee on Aeronautical Law
L. Welch Pogue, *Chairman*
Paul M. Godehn
Palmer Hutcheson, Jr.
Gerald B. Brophy
Frederick E. Hines
Francis H. Inge
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Associate and Advisory Committee
William S. Burton
Albert G. Kulp
George W. Orr
E. Smythe Gambrell
Ray Nyemaster
Donald B. Robertson
Alfred L. Wolf

REPORT TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK OF SUBCOMMITTEE ON THE WARSAW CONVENTION ADOPTED AND APPROVED BY THE COMMITTEE ON AERONAUTICS, MAY 9, 1950

Should the Warsaw Convention be denounced by the United States because of the level of the limits of liability prescribed therein for the death or personal injury of a passenger?

Background and Purpose of the Warsaw Convention

THE purpose of the Warsaw Convention[1] is to establish uniform rules relating to the liability of carriers by air to their passengers and shippers in international transportation. Such uniformity is not only of benefit to the carrier in enabling it to appraise its risks, but is of benefit to passengers and shippers who might otherwise be subjected to various rules of liability in connection with the same journey or shipment. In view of the speed of modern aircraft and the number of countries which may be transited on a single journey, the law applicable to any passenger's injury or shipper's loss

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw on October 12, 1929.

might, and sometimes does, shift many times within a few hours in the absence of some uniform rules. These differences concern not only the rules as to existence of liability itself but many related matters such as, for example, limitation of actions. Recovery for the same injury arising from the same cause might vary from zero to many thousand dollars, depending upon the fortuitous circumstance of where the accident occurred, which might itself be difficult to determine.

As an illustration of the extreme differences in rules of liability in various countries, in the United Kingdom a carrier is permitted to contract out of all liability for injury to passengers, regardless of how the injury may be caused.[2] On the other hand, in most, if not all, jurisdictions in the United States, any such contract would be held to be against public policy. In some jurisdictions it would be invalid under any circumstances. In others it is valid only if the passenger is afforded a choice of rates under which he may contract for unlimited liability. In the absence of statute, liability in the United States, for personal injury or death, is in general based upon fault, which must be proved by the plaintiff. This is subject to varying applications and interpretations of the *res ipsa loquitur* rule. In civil law countries, liability in connection with air transportation is generally governed by statutory provisions, some of which apply generally to all accidents, some to carriers of all classes, and some to air carriers specifically. Many of these rules are obscure and difficult to interpret. Recently Costa Rica and Mexico adopted a rule of absolute liability of an air carrier to its passengers, this being applicable only domestically in the case of Costa Rica.

Not only are the rules of liability different in different countries, but the amounts of recovery may vary to a considerable extent. In the United States, for example, a number of States have limited the amount of recovery in cases of wrongful death. A recent survey showed that 16 States, plus the District of Columbia and Alaska, had established such limits, which varied from $5,000 to $20,000, with a $10,000 limit being established in 10 of the jurisdictions referred to. In Brazil the Air Code sets a limit of Cr$100,000 (approximately $5,000 U.S. Currency) per passenger injured or killed in domestic air transportation in that country. In Mexico, until recently, a regulation issued under the Communications Law provided that, if an air carrier had passenger accident insurance in the amount of 5,000 pesos per passenger (approximately $600 U.S.) covering accidents to passengers in domestic transportation, the air carrier had no further liability to such passengers. Through a recent statutory amendment, Mexico now imposes absolute liability of 50,000 pesos for death of a passenger in domestic air transportation, with greater liability up to 75,000 pesos if the carrier fails to prove that it took all reasonable precautions or that it was impossible to take such precautions, and unlimited liability if wilful misconduct (*dolo*) is established. Apart from statutory limitations, amounts recovered vary considerably as between countries, depending largely upon their individual economic development. As contrasted with other types of rules referred to, certain northern European countries follow a rule under which the recovery in case of wrongful death is measured by the benefit which the heirs or next of kin receive from the estate of the deceased. Thus, recoveries are very limited where large estates are involved.

The Convention, which was finally adopted at a Conference on Private Air Law, held in Warsaw in 1929, necessarily involved a compromise between the rules in effect in the various countries. Those having the highest limits of liability could not have expected all other nations to accept such limits as the standard indemnity, and vice versa. From the point of view of the United States it will be seen that, while the Convention which was adopted

[2] *Luditt v. Ginger Coote Airways, Ltd.*, 1947 USAvR1; *McKay and Craigie v. Scottish Airways, Ltd.*, 1948 USAvR79.

did permit a carrier to limit its liability, the rule in effect requires the defendant to prove absence of fault. In practice this comes very close to absolute liability. Recovery is thus made possible in some instances where an injured passenger might otherwise be unable to recover because of absence of proof.[3]

At the present time there are 34 countries which are adherents to the Warsaw Convention. These include the United States (which adhered to the Convention in 1934) and Great Britain, as well as most of the European countries. Among the Central and South American countries, the only adherents are Mexico and Brazil. The belief has been expressed in quarters close to the subject that the limit of liability has been a deterrent to other Latin American countries from becoming parties to the Convention, because it is relatively high as to them. A number of countries which have adhered to the Convention have incorporated it into their domestic law. These include most of the Northern European countries, Italy and Greece. Brazil has incorporated the principles of the Convention into its law with respect to domestic transportation but with limits of liability at present considerably lower than the Warsaw limits.

Claims and Litigated Cases Arising Under the Convention in the United States

So far as the subcommittee has been able to determine, there have been no published statistics on the number of claims for passenger death or injury which have arisen in the United States and to which the Convention was applicable. However, the subcommittee is reliably informed that there have been roughly 400 such claims of which all but some 10% have been settled without litigation. Of those in which litigation was commenced, it would appear that nearly all have been settled after preliminary or motion proceedings only.

This subcommittee has found only six cases that have reached trial. In each of these cases "wilful misconduct"[4] was put into issue by the plaintiff in an effort to recover more than the Warsaw limit. In two cases the jury returned a verdict for the defendant on this issue. In the third case there was a disagreement by the jury 9 to 3 in favor of the defendant. Recently in a fourth case a jury returned a verdict in favor of the defendant on the issues both of negligence and "wilful misconduct." In a fifth case a motion by the defendant for a directed verdict at the Warsaw limit was granted at the end of plaintiff's case. And in only one of these six cases was a verdict on the issue of "wilful misconduct" returned by the jury in favor of the plaintiff. This verdict in the sum of $25,000 for personal injuries was affirmed on appeal.

The relatively low proportion of litigated claims[5] is believed to be due

[3] See *Wyman and Bartlett v. Pan American Airways, Inc.*, 181 Misc. 963; aff'd 267 App. Div. 947; aff'd. 293 N.Y. 878; Cert. den. 324 U.S. 882, involving loss of an aircraft at sea without trace.

[4] "Wilful misconduct" is a translation of the French word 'dol,' for which there is no exact counterpart in our language and which has had conflicting interpretations.

[5] Some cases of interest, including the six referred to above, are: *Wyman v. Pan American*, 181 Misc. 963, aff'd. 293 N.Y. 878, cert. den. 324 U.S. 882, 1945 USAvR1; *Garcia v. Pan American*, 269 App. Div. 287, aff'd. 295 N.Y. 852, cert. den. 329 U.S. 741, 1945 USAvR39; *Grein v. Imperial Airways*, 1 K.B. 50, 1936 USAvR211; *Indemnity Insurance Co. v. Pan American*, 58 F. Supp. 338 (SDNY); *Sheldon v. Pan American*, 190 Misc. 539 (Sup. Ct., N.Y. Co.); *Ross v. Pan American*, 299 N.Y. 88; *Ulen v. American Airlines*, 1948 USAvR161; *Choy v. Pan American* (not officially reported); *Alpert v. American Overseas Airlines* (not officially reported); *Reitz v. American Airlines* (not officially reported); *Weil v. T.W.A.* (not officially reported); *Peckelis v. T.W.A.* (not officially reported); *Garcia v. Pan American*, 274 App. Div. 996 (2d Dept., 1948), 1948 USAvR622.

in large part to the fact that on the one hand the insurance carriers generally have been willing to pay up to the Warsaw limit because of the extensive proof required that the air carrier has taken "all necessary measures to avoid the damage," and on the other hand that the claimants have generally been willing to accept the Warsaw limit because of the difficulty and expense of proving "wilful misconduct."

RECENT DEVELOPMENTS

Numerous technical suggestions have been made for revision of the Convention, but this report deals only with those relating to the limit of passenger liability.

The Warsaw Convention in exchange for limitation of the amount of recovery against the carrier (in the absence of wilful misconduct) provides for the uniform application of presumptive liability of the carrier on all international transportation between Warsaw countries notwithstanding their national legal systems.

Evaluation of this exchange requires some comparison with domestic standards. As noted, about one-third of the states impose limits for wrongful death averaging about $10,000. We are informed that the average air fatality settlement in the United States as a whole in the last few years has been about $12,000. Although there appear to be no domestic statutory limitations on recovery for personal injuries, the point has been made that the average limit of recovery under the Workmen's Compensation Acts is less than under the Warsaw Convention.

On the other hand, there are instances where limiting recovery by dependents in death cases to $8,300 works severe economic hardship. Apart from the pain and suffering involved many non-fatal injuries are extremely serious requiring expensive and protracted treatment, and many others are permanently crippling. The resulting economic loss to the passenger and his dependents can thus be very substantial.

These hardships in many cases could be overcome by purchase of individual insurance which is now available. The availability of such insurance is offset by the fact that the average passenger does not know that liability is limited and the type of insurance generally offered does not cover injury except for dismemberment.

The International Civil Aviation Organization (I.C.A.O.) of which 56 nations are currently members, for the last few years has been considering revision of the Convention. The United States' representatives on the Legal Committee of I.C.A.O. at its Fourth Session at Montreal in June 1949 supported an increase in the Warsaw limit.

The following is a summary of Replies to a Questionnaire and of voting at Montreal on the subject of increasing the limits of liability:

Questionnaire 1

(a) In favour of maintaining the existing limits for passengers, baggage and freight: Australia, Belgium, Czechoslovakia, Denmark, Finland, France, Italy, Holland, Siam, Switzerland, Union of South Africa, Venezuela.

(b) In favour of maintaining the existing limits for baggage and freight only: Canada, United Kingdom, U.S.A.

Questionnaire 2

In favour of increasing the limits:
Greece (slightly).
United Kingdom (a moderate increase for death or injury)
Sweden and U.S.A. (same as United Kingdom provided that all the existing Contracting States were agreeable).

Canada (double the limits but with the same reservation as Sweden and the U.S.A.).
Ireland, New Zealand, Mexico and Brazil (double limits for passengers but not for freight).
Norway proposed that the present limits should be retained but that in case of death the limit should be automatically payable regardless of the actual damage caused and that the limits should be calculated at the rate of $35 U.S.A. per ounce of fine gold.

Details of voting at Fourth Session of the Legal Committee

(a) On a proposal to double the limits for bodily injury not resulting in death	For 4	Against 8
(b) On a proposal to increase such limits by 25%	For 6	Against 8
(c) On a proposal to double the limits for death or permanent disablement	For 3	Against 12
(d) On a proposal to increase such limits by 25%	For 7	Against 8

The I.C.A.O. Legal Committee reporter on revision of the Warsaw Convention has in a Fourth Draft recommended separation of death and personal injuries and an increase in the limits.

It would also be of interest to mention a report dealing with the subject of liability of domestic carriers published by the Civil Aeronautics Authority in 1941. This report (known as the Sweeney Report) recommended that with respect to fatalities there be a minimum recovery of $2,500 and a maximum of $15,000 or $20,000 and scheduled compensation in the event of personal injuries. Liability was to be presumptive as under the Warsaw Convention.

In 1944 Congressman O'Hara introduced a bill for the regulation of liability of air carriers and foreign air carriers otherwise not subject to the Warsaw Convention. It provided for presumptive liability with a death limit of $10,000 and a personal injury limit of $50,000. The bill was never reported out of Committee.

Recommendation

The summary above given serves to bring into focus the question whether the limit of liability under the Warsaw Convention is too low and whether the United States should denounce the Convention for that reason.

After weighing the points above discussed, this Subcommittee makes the following recommendations:

1. The Convention should not be denounced as that would undo what has been a constructive forward step in International Aviation Law.
2. The liability limits should be increased to the extent that an increase would not provoke any withdrawals from the Convention, or deter adherence thereto by additional countries.
3. Claims for personal injury should be treated separately from death claims and different limits should be placed on each category.
4. In the meantime, a program should be encouraged which would acquaint passengers with the liability limitations of the Convention and the availability of insurance coverage for themselves.

Respectfully submitted,

Subcommittee on the Warsaw Convention
Theodore E. Wolcott, *Chairman*
Gilbert Kerlin
John C. Pirie
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STATE AND LOCAL

Department Editor: Madeline C. Dinu*

NASAO ACTIVITIES

THE accelerated activities in civilian defense mobilization plans and their impact upon aviation as a whole, were reflected in the deliberations of the NASAO at its Annual Meeting in Minneapolis, October 2-4, 1950. At the same time the agenda items also indicated a determination to continue normal activities, and promote to the greatest extent the uses, functions, and development of civil aviation during the defense preparedness period.

The Meeting was also among the first public occasions at which the newly appointed Chairman of CAB, Delos W. Rentzel, and the new Administrator of Civil Aeronautics, Donald W. Nyrop, gave expression to the objectives they hoped to achieve in their new responsibilities. Close coordination and cooperation with the state aviation officials was indicated. Thirty-two states and Alaska were officially represented from the NASAO membership, with greater participation by various industry groups, associations, federal, state and local agencies than at any previous NASAO annual meeting.

The Report of the NASAO Civil Air Defense Committee indicated that the National Civil Defense Plan proposed during the Summer of 1950 did not include utilization of the non-airline potential of civil aviation. There appeared indications that this segment of aviation was headed for new wartime emergency controls and rigid regulation, a waste of these available resources in aircraft, airports, pilots and other trained airmen. Upon appointment of this Committee, a draft outline of the manner in which civil non-airline aviation could contribute maximum benefit to the welfare of the Nation in a war emergency, and the *modus operandi*, was prepared, containing seven areas of contribution:

1. Reconnaissance of disaster area to determine extent of damage and contamination.
2. Use of slow flying aircraft equipped with high-power public-address equipment to bring information to large numbers of persons simultaneously, calming panic, guiding survivors, rescue squads, fire fighting squads, medical teams, etc.
3. Transportation of key medical personnel and disaster specialists, as well as small-bulk supplies and equipment to and from a disaster area, *viz.*: serums, plasma, breakdown replacement parts, etc.
4. Supplementing or supplanting, to the extent necessary, congested or disrupted channels of communication and transportation in general.
5. Evacuation of wounded from local areas to collection points where major components of transportation may be available for relatively long-haul evacuation.
6. If practicable, atomic or bacteriological decontamination of areas affected.
7. Surveillance, control and direction of critical congestion points in surface transportation systems.

After concerted review of this draft outline by ten national industry associations organized as the "Emergency Aviation Council," and subsequently by the CAA's Aviation Development Advisory Committee, it was submitted in condensed form to the National Security Resources Board and to the President sometime after the close of the NASAO convention. The ADAC program, as it is now called, contains six main parts:

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* General Counsel NASAO.

I. SECURITY CONTROLS

Airmen: Security Clearance of Certificated Pilots and Ground personnel.
Airports: Criteria for "control airports" and Essential prerequisites.
Aircraft: Registration with a State Defense Council or "control airport."
Flight Schools: Maintenance of complete operations records and availability for immediate inspection when necessary.

II. AIRPORTS

Urgent need for keeping the Nation's airports operating on a going concern basis, particularly of smaller Classes 1, 2 and 3 fields, which can serve vital communication and defense needs of small and moderate-sized communities not only for air transportation purposes but as local headquarters for home air guard and civilian defense organizations.

Reactivation, as far as practicable, of the large number of surplus World War II airports before taking over civil fields. In the event civil airports are needed for military use, that civil and military traffic use the field jointly until such time as its full capacity is needed for military aircraft alone.

III. MOBILIZATION OF CIVIL AVIATION RESOURCES

(60,000 active aircraft, 500,000 trained airmen, 5,000 operating non-military airports.)

IV. TRANSPORTATION, INDUSTRIAL AND AGRICULTURAL

A. *Logistics.* "Little realized is the fact that there exists today a vast fleet of non-military, non-airline civil aircraft capable of flying a maximum of 112,056,552 *seat miles during each* 12 *hour day!*" This fleet is capable of *simultaneously carrying* 191,839 *persons, or the equivalent of twelve and one-half divisions of troops.* This figure augments the 48,279 *total seat capacity* of our domestic and foreign *airline aircraft.*
B. *Agricultural and Industrial Flying.*
C. *Executive Flying.*
D. *Air Taxi, Charter and Jitney Service.*
E. *Feeder Lines.*
F. *Priorities.* Production of necessary aircraft, parts and equipment to keep these functions available. (This has just been implemented by D. W. Rentzel, as Chairman of the Air Coordinating Committee.)

V. TRAINING AND MAINTENANCE BASES

VI. MANUFACTURING AND ENGINEERING

This is an excellent blueprint of civilian aviation mobilization. It should be in the hands of every person who is a part of the overall General Mobilization Plan. In accepting the ADAC Report, D. W. Rentzel commented:†

"The non-airline civil aviation industry, rising to the needs of our Nation in this emergency, has made a valuable contribution to national defense in the report of the Aviation Development Advisory Committee.

"It is inspiring that an industry as diverse as this can so quickly appraise its multiple assets, volunteer a plan to police itself in the interest of national security, and blueprint the many and extremely helpful ways in which it can make the maximum contribution to the welfare of the United States.

"The accomplishments of your Committee are particularly impressive in view of the short time available for the task. As the international situation changes, and as additional information becomes available, I sincerely hope that your Committee will continue to give me the benefits of its counsel in this area, as well as its normal 'grass roots' advice on day-to-day civil aviation problems.

"Certain of the Committee's recommendations fall directly within the province of the Civil Aeronautics Administration. These I intend to implement at once. The other recommendations will, of course, be discussed as soon as possible with the appropriate agencies concerned.

"If the recommendations of your Committee are carried out, particularly in relation to security, I believe the non-airline civil aviation industry can continue all the activties which are now bringing essential benefits to our economy and defense preparations, including agricultural, industrial, executive and personal flying. At the same time, the industry will be prepared to render maximum assistance to the Nation in event of all-out war or attack on our country."

† Letter dated August 29, 1950.

The NASAO moved to appoint a committee to assist in drafting criteria and regulations for implementation of the ADAC Plan, and for prompt appointment of a civil aviation representative on respective State Civil Defense Organizations. Since the Minneapolis meeting, the NSRB has taken steps toward mobilization planning for all segments of the aviation industry, through Task Forces, headed by CAB Chairman D. W. Rentzel, and who are to make their basic report by January 15, 1951. These Task Forces are:

I. AIR TRANSPORT TASK GROUP
   1. Military Modification
   2. Equipment and Replacement Parts Requirements
   3. Manpower
   4. War Air Service Pattern
   5. Air Priorities

II. TRAINING—OVERHAUL—MAINTENANCE TASK GROUP
   1. Training
   2. Overhaul and Maintenance
   3. Private Flying
   4. Airports
   5. Airways

The oft-discussed subject of Economic Regulation of Air Commerce and its corollary, air routes and patterns, was reported on by the Committee studying this activity. It outlined three systems of routes or services needed:

1. *Primary Air Service System*—providing inter-area scheduled air transportation.
2. *Secondary Air Service System*—providing inter-urban air service between communities where relationship as to geographical location, population and commercial importance form natural routes,—and are complementary to the primary air service system.
3. *Tertiary Air Service System*—providing all other non-scheduled public air transportation.

The Committee suggested that more or less uniform criteria be used in establishing systems as indicated, and that a concrete plan should exist at the federal level to provide a complete air transportation system. It felt that it now had reason to believe and assume that the CAB would respect the right of the states to participate in over-all route planning affecting the respective individual states. A detailsd step-by-step outline of criteria to be used by the states in establishing a draft of its route pattern within its borders and correlating it with several adjacent states for an area route pattern was presented. It indicated that several states were already undertaking such area planning, and urged as many of the states as could, to do so at the earliest moment.

One of the subjects commanding major interest was the Report of the Safety and Enforcement Committee. The proposed Federal-State Safety and Enforcement Program developed over a period of two years by a joint Federal-State-Industry Committee was presented to and adopted by the membership. The new CAA Administrator, Donald W. Nyrop, informed the meeting that the CAA concurs in the program as drafted, and D. W. Rentzel, new CAB Chairman pledged his efforts to obtain CAB's approval.

The Special Committee appointed to review the various uniform state aviation laws and to make recommendations for their revisions, indicated that the task was one requiring considerable more study and time. It gave an interim report on certain parts of the Uniform Aeronautics Act, State Aeronautics Commission or Department Act, State Airport Zoning Act, Airport Authority Act, Municipal Airport Act, and a proposal for a Recordation of Aircraft Conveyances, Liens, Encumbrances, etc. Act.

Its conclusion regarding the "Absolute Liability" problem in civilian aviation was that legislative consideration can best be approached in three different phases at a given state level:

(1) Recodification of existing state aeronautical statutes permitting the elimination or restriction of the absolute liability law from the State code or statutes.
(2) Development of a theory founded on the presumption of liability—the theory of presumption of liability merely presumes the aircraft owner to be liable and so places the burden on the owner or operator to prove he was not negligent.
(3) Development of Aircraft Owner Financial Responsibility Laws for state legislative consideration.

To meet these ends, the Committee had under consideration legislative drafts based on "financial responsibility" and on "presumption of liability" on which it would continue its study and analysis.

Certain additions to the Uniform Aeronautics Act were considered by the Committee respecting: 1) a "Guest Act" section providing immunity from liability to a gratuitous passenger or his personal representative, in the event of death or injury of such guest passenger unless the injury or death were caused by the willful or wanton misconduct of the airman or owner; 2) a "Joy Riding Act" section making it a misdemeanor for any person to operate an aircraft without the owner's consent; and 3) an "Aircraft Liens Act" section for services and materials rendered, performed or furnished to an aircraft and its owner.

Recommendations tentatively made for improvement in the State Aeronautics Commission or Department Act were:

(1) The Act should be brought up to date to conform more closely with NASAO policy, and made consistent with developments in recent years.
(2) Develop more realistic and adequate facilities for airport zoning procedures, planning and administration.
(3) Consider inclusion of privately owned airports within the state airport plan permitting state assistance in the improvement and development of such airports under certain circumstances.
(4) Improve and develop section 21 on enforcement of aeronautical laws.
(5) Revision and amendment of the reckless flying section to meet the problem in definition or determination of a standard of what is a "reckless" or "dangerous" flight activity.

Need was also expressed for possible inclusion of a new section in the Act the purpose of which would be to implement the effectiveness of state civil defense procedures by expressly authorizing the Department or Commission to supervise the non-scheduled civil aviation aspect of any civil defense program.

Although the work of the Committee on the State Airport Zoning Act was not complete, certain general recommendations were submitted:

(1) Rigid zoning standards should not be invoked in the drafting of any Uniform Zoning Act.
(2) Airport zoning standards created at the state level may be feasible for adoption and use by the municipalities or political subdivisions of the state.
(3) State approval of each airport zoning plan is not deemed feasible.
(4) Provision in the Act for use of an airport zoning commission on a permissive basis may lend greater flexibility to the Act.
(5) The Committee further recommended that the Uniform Zoning Act be revised to provide for airport zoning protection to privately owned airports rendering a public service.

On the Airport Authority Act there were two diametrically opposed positions expressed by Committee members. One position assumes that the present Act is much too limited in concept and maintains that the authority provided should be as broad as that general legislative authority granted to

drainage, school and road districts. Supporters of this view believe that there is need to provide specific and definite tax levying, policy and general administration powers in a Uniform Airport Authority Act. The other position opposes a strong airport authority and is based on the premise that such a concept is bad from a governmental administrative standpoint because it (1) creates a separate entity of government which can function or operate in complete contravention of a state aviation agency or of the central government body or agency at the local level; (2) permits and encourages the promulgation of many different sets of aviation regulations by several airport authorities in a general area; (3) superimposes many municipal districts upon state government.

The Committee found that there exists a direct relationship and similarity between the Municipal Airport Act and the Airport Authority Act. That fact was given much consideration, resulting in the recommendation that a special committee be appointed to attempt to recodify, assimilate and formulate all provisions of the several uniform aeronautical acts having a definite relationship or correllation into a General Uniform Act.

The Committee found an apparent need for a formal study of the growing problem pertaining to recordation of aircraft conveyances, including titles, mortgages, liens. Two courses of action were recommended to be placed into operation concurrently:

(1) A satisfactory uniform state aircraft recordation statute be drafted, and a locally acceptable adaptation be enacted by the several states.
(2) Either that it be determined that such state recordation acts can exist compatibly and concurrently with the present federal recordation act, or else that the Federal recordation act be amended to accommodate such state acts.

The Committee further recommended that its work in redrafting of any of the Uniform Aviation Laws be coordinated with the Council of State Governments and with the Commissioners on Uniform State Laws.

The Flying Farmers organizations, both national and local, expressed their needs and problems. It is one of the most active segments of civil aviation activity today, particularly in the areas of the Middle West, West and South. It was stated that with development of an agricultural aircraft for crop seeding, dusting, and control, and with need to produce more farm products under more and more restrictive labor conditions, a program of a large number of single strip landing areas near the cross-roads of small communities, such as county seats and market cities, would be to their advantage. This expressed need confirmed the NASAO's stressing of amendment to the Federal Airport Act permitting the establishment and construction of a group of such landing areas as one consolidated project under state aeronautic agency sponsorship, exempt from the many legal and economic requirements provided in that Act for Class I and larger airports. The Special NASAO Committee appointed to study the problem presented a draft for amending the Act to achieve this end, and continuing efforts are planned to have amending legislation introduced in Congress at an early date.

An identifying system of air marking of such landing areas and agricultural landing strips on privately owned lands of farmers and ranchers would need to be developed. This because of the legal questions arising under the "invitee" character of use of such strips by other persons in emergencies. The airmarking section of the CAA indicated complete cooperation in the development of such an identifying system bearing the liability aspect in mind.

Search and Rescue of aircraft in distress or unaccounted for was reported on by presentation of draft of a Civil Aviation Search and Rescue

Plan dated September 1, 1950. Division of responsibility for functions were proposed among the Commerce Department(CAA), Treasury(Coast Guard), Department of Defense (military), CAB and FCC, and the NASAO, in accordance with a proposed *uniform and permanent organizational structure.* All states and federal agencies recognize the need for civil defense planning which has related requirements for search and rescue. Minimum procedures required were summarized:

(1) Procedures for alerting posts.
(2) Equipment and procedures for rescue coordination centers.
(3) Equipment and procedures for rescue units.
(4) Procedures for person in charge of the rescue unit at place of accident.
(5) Procedures for civil pilots observing an accident.
(6) Procedures for other persons observing an accident.
(7) Signal codes for use by survivors.
(8) Signal codes for use by search parties.

Legal Counsel's Report contained the following eight recommendations to the membership, the seventh of which was in the form of a "minority expression of position on the Enforcement topic:"

(1) That the NASAO determinedly work toward establishment of an economic air transportation system.
(2) That wherever areas of functioning of state aviation agencies or local units of government cannot be clarified through administrative interpretation of basic acts, a decisive program of amendatory legislation at federal, state and local level be inaugurated and supported vigorously.
(3) That whenever costs of projects under any segment of the federal programs are unconscionably high, state aviation officials courageously present the issues squarely to the supporting public, and recommend greater use of the self-help principle.
(4) That the NASAO offer its tangible assistance to the Senate Interstate and Foreign Commerce Committee in its present study of costs of our air transportation system, with particular reference to investments of state and local governments in establishment of airports and related facilities for scheduled airline use.
(5) That the NASAO break the bugaboo of state aviation gasoline taxes by gathering all information respecting gasoline taxes in the motor vehicle field and presenting the true facts to the public.
(6) That the NASAO vigorously oppose any federalization of compulsory insurance or financial responsibility of aircraft owners.
(7) That the enforcement program be resolved in a realistic manner.
(8) That state aviation commissions and directors re-emphasize the interrelationship of state aviation with other agencies of state and local governments, and establish closer liaison among them.

The reporting of the Aviation Education Committee indicated its recommendation that in future aviation education programs, adults rather than children be given top priority, the reason being that children already know more about aviation than parents, and adults are needed to provide the necessary business and finances to keep the industry on a going basis in the present.

Action Resolutions Adopted

Action of the membership on the various studies, reports and recommendations of the NASAO Committees was taken by the adoption of the following Resolutions:

> That commercial radio broadcasting stations which schedule flying weather reports and forecasts be complimented on the important public service they are rendering, and that the National Association of Broadcasters be urged to encourage all of its members to include in their daily programs flying weather reports and forecasts available from United States Government Airways Weather Forecasting Centers.

That the Administrator of Civil Aeronautics be urged to:

(1) Follow the policy established by his predecessor of not permitting the discontinuance of any low frequency radio weather transmitting facilities without first determining, from all classes of users, that any such facility is no longer necessary; and

(2) Prepare, in consultation with the NASAO and others interested, a plan for the indefinite continuance of scheduled weather broadcasts in the 200-400 kc. band.

That the CAB be urged to revise its Civil Air Regulations, Part 3, at once, to permit flight testing as an alternative to the presently required stress analyses, in accordance with the recommendations of the NASAO and the CAA.

That all appropriate Federal agencies, and the governors of the several states, be urged to take whatever steps may be necessary immediately to adopt and implement the recommendations of the ADAC Civil Aviation Mobilization Plan for the maximum utilization of civil aircraft in the event of national emergency, and that it be used as the basis of civil aircraft mobilization by the defense agencies of the several states.

That all appropriate agencies, private, municipal, state and Federal, be urged to consider all existing airports, no matter how small, as being important in the interests of internal security and civil defense, and that the CAA be urged to effect any necessary revision of the recently announced policy so as to permit federal airport aid for small airports, in accordance with the provisions of the authorizing Federal Airport Act.

That the CAA be urged to make no changes in the planned airport program for 1951, which was prepared in cooperation with the states, without first consulting in each instance with the aeronautics agency of the affected state.

That the NASAO indicate the support of its membership to aid the Territory of Alaska in its efforts to become a state insofar as this will enable fuller participation by Alaska in the aviation activities of the United States.

That the CAA be urged, in regions where this is not already being done, to:

(1) issue low flying waivers to cover the area of one state only.

(2) restrict the issuance of such waivers to safety agents assigned to the designated state

(3) immediately forward to the affected state aviation agency copies of all such waivers or renewals thereof.

That the CAB be urged to adopt and publish at the very earliest date a basic policy for the development and preservation of an adequate air transportation system, such policy to be based on such precepts as will recognize the need for Secondary Air Service, and define its function and relationship as a major component of air transportation; and that the states assist and cooperate with the CAB in the formulation of such basic plan.

That the NASAO express to the RTCA and to the Federal Communications Commission its gratification and appreciation for their promptness in taking action in the matter of making 122.8 mc. available as a simplex frequency for airdrome advisory service, and urge that the

FCC expedite the adoption of the proposed rules permitting the use of this frequency, but strongly recommend that:

A. No more stringent requirement be established for the qualification of the operator of the ground station than is required for the operator of the airborne station; and

B. Consideration be given to raising the two watt power limitation on the aircraft radio transmitter to at least three watts, thereby permitting the use of HF transmitters presently available and installed in personal type aircraft.

That the NASAO urge manufacturers and distributors of airborne and airdrome radio equipment to make every effort to supply, as expeditiously as possible, effective low cost transmitting and receiving equipment which may be operated on the above frequency.

That the NASAO urge fixed base operators at off-airway points to install such ground radio equipment for the convenience and safety of traffic flowing to and through the area which they serve, and that similarly, aircraft owners equip or modify their existing equipment at the earliest possible moment to make use of this frequency.

That the President of NASAO designate an appropriate committee to study and act upon:

(1) Ways and means of building, under the Federal Airport Act or otherwise, airports necessary to national or civil defense but which either are not included in the current Federal Airport Plan or are inconsistent with the standards established thereunder, and

(2) Ways and means of financing such construction in whole or in part with moneys appropriated by the Federal Government for defense purposes.

The newly elected officers of the NASAO for the coming year are:

President—Crocker Snow, Director of Aeronautics, Massachusetts.

1st Vice President—Joseph K. McLaughlin, Director, Illinois Department of Aeronautics.

2nd Vice President—Warren E. Carey, Director, California Aeronautics Commission.

3rd Vice President—C. A. Moore, Director, Mississippi Aeronautics Commission.

Treasurer—C. B. Friday, Director, Bureau of Aviation, New York.

Legal Counsel—Madeline C. Dinu, Detroit, Michigan.

M.C.D.

JUDICIAL AND REGULATORY DECISIONS

Department Editor: Bernard R. Balch*

THE AVIATION HAZARD IN RADIO-TELEVISION PROGRESS

WITH frequency modulation and television developing as important branches of radio broadcasting, aviation's paramount need to keep the air free of serious hazards to air navigation is pointed up once more. The towering antennae which mark standard radio transmitting stations are inadequate, in terms of height, for either FM or television. Tower heights must increase if radio and television are to progress; but in the coming era of super-speed jets and mammoth planes air traffic already needs the space radio towers now occupy. While the AM radio antenna already presents a serious aviation hazard, if FM and television antennae begin puncturing the atmosphere at greater heights, the hazard to air navigation obviously will become more serious and could eventually hamper the advance of aviation.

The obstruction to aircraft flight has already received the attention of every branch of government—judicial, legislative, and administrative. Courts have petitioned to enjoin the erection and maintenance of such hazards as wooden poles with no apparent usefulness,[1] and of water towers [2] —useful in the extreme. No reported case involving radio antennae can be found indicating that the antennae hazard has been handled elsewhere. State legislatures have exercised their prerogative of authorizing municipalities to step in by zoning laws where the aviation hazard arises,[3] and the United States Congress has made such action mandatory as a requisite to getting federal benefits for local airport projects.[4] In the legislative area, as in the judicial, no special treatment is accorded radio towers; yet their inclusion in the general provision is obvious. Within the administrative framework of the Federal Communications Commission and the Civil Aeronautics Administration there is some doubt as to whether, with the variety of powers these agencies possess, either can actually prohibit the construction of abnormally high radio and television antennae.

Judicially, the evolution of the conflict has been an outgrowth of real property concepts. The development of the law of real property at a time when the uses to which the air above the land could be put were unforeseen gave rise to the *"ad coelum"* doctrine, whereby the landowner owned not only his soil, but also everything above and below.[5] In its practical application this idea merely safeguarded the proprietary rights of the landowner over the airspace immediately above his land, such as for building purposes and for protection against encroachments of fences and trees growing on adjoining lands. Theoretically, however, its operation was unlimited, and for a time in the early stages of the development of air law it threatened

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[1] United Airports Co. of Calif. v. Hinman, 1 Avi. 823 (S.D. Cal. 1939).

[2] Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177 (E.D.N.Y. 1950).

[3] Cal. Laws 1949, c. 588; Idaho Laws 1947, c. 130; Ill. Laws 1949, S.B. No. 591; Iowa Laws 1947, c. 182; Kas. Laws 1947, c. 13; Mont. Laws 1947, c. 287; Nev. Laws 1947, c. 205; Ore. Laws 1947, c. 205; Ore. Laws 1947, c. 542; Tex. Laws 1947, c. 391; Wis. Laws 1947, c. 516.

[4] Federal Airport Act, 60 Stat. 170 (1946), 49 U.S.C. §1102 (1948).

[5] For an excellent doctrinal analysis of the maxim, "cujus est solum ejus est usque ad coelum," see Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. 329 (1932).

to thwart the growth of air navigation. Thanks to the liberal attitude of the courts the law has assumed a course in disregard of the literal application of the doctrine,[6] although its continuous prevalence, so far as necessary to protect the landowner's rights over the "usable column of air" above his land, remains unchallenged.

At the present time the right of an aviator to fly over the land of another, at an altitude not involving any interference with the potential proprietary or possessory rights of the landowner in his land, is of course unquestionable.[7] Both the landowner and the aviator, then, are protected; and the extent of that protection is illustrated in the recent case of *Roosevelt Field v. Town of North Hempstead.*[8] Plaintiff sought to enjoin the maintenance of a village water tower, upon the theory that it was an aeronautical hazard and a public and private nuisance. The need for the water tower was so great that the town council waived compliance with certain building ordinances in order to expedite its construction. Plaintiff claimed that there had been a "taking by defendants of property in the public domain through which plaintiffs had freedom of transit." [9] In a balancing of equities by the court, the defendant won easily. The town's need of a water supply was undisputed. The airfield was shown to be of little consequence due to the fact that it was equipped to handle only small private aircraft. Its runways were short and shabby, and the field itself was not a lucrative business.[10] Throughout similar judicial decisions it has been a combination of utility and necessity, as here, that has determined the outcome.[11] There is no reason to suspect that a radio tower would receive any different treatment should it ever become the subject of litigation.

Legislative action to restrict the aviation hazards is typically of recent date. Since 1947 a rash of zoning laws, including amendments to outdated ones, has spread on the statutory scene. Some, like those of California [12] and Idaho,[13] merely reconstructed the official state attitude toward arbitrary condemnation of property, providing for closer consideration of actual community needs and private interests. Others, like those of Illinois [14] and Arkansas,[15] actually prohibited or gave to municipalities the power to pro-

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[6] See note 11 *infra.*

[7] For a summary of cases, see Note, 69 A.L.R. 317 (1930).

[8] 88 F. Supp. 177 (E.D.N.Y. 1950).

[9] Plaintiff claimed that there would be no taking of defendant's property in the super-adjacent air space, because its use of the upper reaches thereof had already been taken by the exercise of such police powers under the zoning law. The court dismissed this contention on the ground that the zoning law did not automatically place all airspace in the vicinity of airfields in the public domain, but only those specifically provided for by ordinance.

[10] In spite of this fact, the CAA clearly regarded the tower as an aeronautical hazard, but in a letter to defendant admitted the absence of authority to prevent the construction, and pleaded for reconsideration of the proposed construction in the interest of safeguarding lives and property. The court itself, noting that plaintiff could have appealed the approval of the construction before it was actually begun, was in no mood to hear arguments after the fact of construction was already a reality.

[11] In United Airports Co. of Calif. v. Hinman, 1 Avi. 823 (S.D. Cal. 1939), the court had little difficulty awarding an injunction. Plaintiff airport owner had a thriving business, providing facilities of the highest type for commercial and government-owned planes. Defendant, on the other hand, had no actual interest at stake, having erected a derrick and numerous tall poles at the periphery of the airport for the sole purpose of hampering the airport's traffic. There was also evidence attesting to the fact that the construction of the hazards was in itself dangerous. The court did reserve the right to lift the injunction if defendant could prove that his use of the land in good faith necessitated the erection of such structures.

[12] Cal. Laws 1949, c. 588.

[13] Idaho Laws 1947, c. 130.

[14] Ill. Laws 1949, S.B. No. 591.

[15] Ark. Laws 1949, c. 285.

hibit certain types of construction above specified heights within airport vicinities.[16] Some concern was demonstrated with respect to the right of the state to so zone private property. In *United States v. Causby* [17] it was determined that the government took an easement when it used the airspace over a chicken farm in such a way as to destroy the use of the land for that particular purpose. The Supreme Court ruled that the government must compensate the landowner.[18] In the state zoning statutes compensation is not provided for, but one responsible state official insists that constitutional prohibitions against taking property without compensation are not flouted thereby. Granting that the state contemplates, through its zoning laws, the taking of an easement over the landowner's property, he reasons that the constitutional prohibition yields to the inherent police power vested in the state.[19]

The Federal Airport Act of 1946 [20] takes a somewhat different approach. It is not a zoning law; yet in order for localities to secure federal funds for expansion and improvement of airport facilities the Civil Aeronautics Administrator must have written assurance that "the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards, and by preventing the establishment or creation of future airport hazards." [21] Here specific consideration of radio towers is present; the Administrator is authorized to seek the aid of the FCC in eliminating airport hazards caused by such towers.[22] The Act adds, however, that the Federal Government may share in the cost of "acquiring land or interests therein or easements through or other interests in airspace . . ." [23]

Administration of the Federal Communications Act and Civil Aeronautics Act has become, with respect to the existence of radio tower aviation hazards, a somewhat disjointed joint venture. Part of the FCC's power to license broadcasting stations is its power to pass on the sufficiency of the structure of the antenna, in terms of whether it is built for safety as to passersby on the ground.[24] In addition the agency's regulations provide two types of protection to the aviator. First is the prohibition against changes in existing antennae without specific authorization from the Commission, when the changes will make the antenna a certain height, or put it within a certain distance from a landing area.[25] Second is the power to require painting and/or illumination of radio towers which are or may become hazards to air navigation.[26] CAA regulations provide for notice to be given to the Administrator when either alteration or construction of structures of a certain height and near civil airways are proposed, or if they are within a certain distance from a landing area.[27] Hence neither agency has the flat power to *prohibit* construction or alteration of radio towers.

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[16] The Illinois statute, for example, allows restriction of the height of any structure "upon the relationship of one foot of height to each twenty feet of distance from the boundary line" of the airport.

[17] 328 U.S. 256 (1946).

[18] The case is fully considered in the note in 14 J. AIR L. 112 (1947).

[19] This is taken from an opinion rendered by the attorney-general of the State of West Virginia upon receipt of a request for information from interested parties. 1 Avi. Rep. 19, 151.

[20] 60 STAT. 170 (1946), 49 U.S.C. §1102 (1948).

[21] 60 STAT. 176 (1946), 49 U.S.C. §1110 (1948).

[22] 60 STAT. 171 (1946), 49 U.S.C. §1102 (1948).

[23] 60 STAT. 176 (1946), 49 U.S.C. §1109(d) (1948).

[24] This power is derived directly from the Communications Act of 1934, requiring the issuance of a construction permit before issuing a license to establish the broadcasting station. 48 STAT. 1089 (1934), 47 U.S.C. §319 (1948).

[25] 47 CODE FED. REGS. §9.110 (1949).

[26] Regulations under this heading are derived from the statute. 48 STAT. 1083 (1934), 47 U.S.C. §303(q) (1948).

[27] 14 CODE FED. REGS. §625.1 (1949).

A typical FCC proceeding illustrates how these agencies, in concert, manage to prohibit construction or alteration in spite of their supposed handicap. Earlier this year, radio station WOR in New York City sought permission to enlarge its broadcasting facilities by increasing the heights of its antennae, which apparently lie in and near certain designated airways and traffic approaches to several airports in the New York-New Jersey area. As in all FCC proceedings, the parties were met with the need of establishing the utility of the proposed construction.[28] In this particular case, however, the chief source of contention lay in the intervention of the CAA and other aviation interests,[29] all claiming that the new antennae would seriously hamper air traffic in the area, and would constitute a menace to life and property. The FCC made it clear that it was its policy to consult the CAA and other interested parties wherever a possible aviation hazard is involved.[30] WOR had several good arguments to sustain its position that the increased heights of the antennae would not present a serious hazard,[31] but eventually withdrew its application, indicating that the CAA's intervention was more than nominally successful. No official decision is available.[32]

The fact that the regulations of the two agencies present an overlapping of authority need not lead to the conclusion that a conflict exists. It is altogether logical that these two agencies work together, for the problem is common to both. Granted that once they combine their efforts the applicant for construction of an extremely high antenna has little chance of succeeding, it is equally true that adequate opportunity is provided for a hearing, and for appeal to the judicial process.[33] This latter remedy in all likelihood will be unavailing, it is admitted, for the courts today favor the landowner only under extreme conditions. Needless to say, organized legitimate aviation has highest priority in the use of airspace not previously occupied.

The city planners of today might derive great benefit from this realization. Forward-looking municipal authorities are seriously concerned with both radio and aviation, both of which can contribute substantially to the material progress of the city in the form of added employment and income. Under zoning laws, cities are relatively free to select the location of new public airports, and by intelligent cooperation with radio stations can leave ample space for the erection of antennae without hampering air traffic. However, in most cases the airport is an established fact. In such cases, if the broadcaster is forced to construct antennae in locations where aviation safety will not be endangered, his cost will be a fraction of the cost in lives and property that would otherwise be menaced. FM and television need not leave the scene of aviation progress; but in any event they will be forced to move over, whether by the courts, the legislatures or administrative agencies.

HOWARD JOSEPH *

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[28] As to the utility of the new antennae, WOR claimed its proposed expansion was designed to increase the population served by 38%, and the area served by 212%. In addition it showed how it was performing a public service every day by presenting religious, educational, and patriotic programs, many of which were sustained by the broadcasting station, rather than by paid advertising.

[29] Namely, the Air Transport Association of America and the Port of New York Authority.

[30] 47 CODE FED. REGS. §1.377 (1949).

[31] The applicant contended, among other things, that the towers had always been considered an excellent checkpoint for pilots entering the area, and this was backed up with testimony from pilots; there was, of course, equally convincing testimony to the opposite effect.

[32] No reference to the proceeding is to be found in the trade journals, nor do the various law services provide a clue as to the actual reasons for the withdrawal of the application.

[33] 48 STAT. 1093 (1934), 47 U.S.C. §402(b)(1) (1948).

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BOOK REVIEWS

Otto Riese: Luftrecht: Das International Recht der Zivilen Luftfahrt Unter Besonder Berucksichtigung des Schweizerischen Rechts, Stuttgart, K. F. Koehler Verlag, 1949.

The immediate occasion for this treatise on "the international law of civil air transport under special consideration of Swiss law," to translate the lengthy sub-title, was the promulgation of the new Swiss air law of Dec. 21, 1948. In addition to offering the student an introduction to air law, and the practitioner an over-all survey, the announced purpose of the book is to provide a basis for further legislative action. What might under other authorship have been stillborn as a classroom instructional manual is broadened by this diversity of purpose and deepened by Riese's intimate knowledge of the historical evolution of air law.

Otto Riese's personal qualifications for this study of international air law include membership in the CITEJA, and participation in the conferences of Paris, Warsaw, Rome and Brussels. Since 1935 he has added the professorship of air law at the University of Lausanne to his scholarly credentials.

The sequence of treatment indicated by the sub-title is that followed throughout the book: the description at length of the international law (or in its absence, of the official drafts preliminary to such a law) is followed by citations from the new Swiss code, or comments on Swiss practice. The use of this device of a contrast between international law and the law of an arbitrarily selected national state is explained in this way:

> Because of the international character of air transportation, it is incumbent upon us to discuss international law. However, the latter requires the foundation of the air legislation of the individual states. If our study is not to remain a torso, this interpretation of internationally accepted and purely intra-state legal norms must be visualized on the basis of a national legal order. We have selected the Swiss law for this purpose, because it contains the most modern air legislation. . . .

Problems of private air law are approached by the comparative method. A count of footnotes in the first section devoted to private air law, that headed "Ground Rights and Air Law," indicates that approximately a third are citations of Swiss authorities. The other references are derived, roughly equally, from French, German, English, and American sources. This admittedly crude sampling procedure does indicate something of Riese's breadth of documentation.

In accordance with this emphasis on the international, Riese expressly announces his abstention from questions of purely local significance, such as the Swiss Federation-Canton-Community relationship, or the administrative procedure of Swiss regulatory agencies. Understandable is the complete exclusion of air mail and the law of aerial warfare, and the deliberate neglect of the problems of aerial insurance and of international private law, although a separate study of the last two is promised for future publication. Riese freely expresses his opinion on moot questions of the law, but attempts a dispassionate representation of economic and political problems. The expression of opinion on the conflict of interests between the scheduled and unscheduled carrier is of interest:

> . . . the air lines feel themselves threatened and ask effective protection. The American authorities have thoroughly complied; particularly,

> passenger transport is permitted the irregular carrier only in very definitely irregular traffic, and completely forbidden internationally. We consider this no satisfactory solution; as long as the demand exists, it is to the public interest that the non-scheduled carrier be free to develop. For the same reason, in our opinion, it is not justified to compel the non-scheduled carrier to ask higher tariffs than those called for in regular traffic.

There is too much meaty, closely knit thinking in this detailed study of the evolution and present status of the principal problems of air law for any quick and easy summaries. Structurally, the book is in two parts, the "general" and the "special," further broken down into a total of 52 sections. The first part is subdivided into 4 chapters: "The Concept and Nature of Air Law," "The Sources of Air Law," "The Unification of International Air Law," and "The Airspace and the International Unification of Public Air Law." The detailed and pertinent comparison of CINA and ICAO, and the analysis of the Chicago Convention and the "Fifth Liberty" should probably be specially distinguished.

Of the 8 chapters in the "special" section, the first two, "The Aircraft and Its Crew" and "The Ground Organization," are presented primarily as questions of public law. The concluding chapters devoted to private law are: "Ground Rights and Air Law," "The Airplane in Its Relation to Private Law," "Responsibility in Regard to Third Parties," "Air Transport Law," "Salvage and Rescue," "The Collision of Airplanes." For this reviewer, the most interesting single part of this section is the over 100 pages given the Warsaw Convention and its proposed revisions. Riese's own point of view is that the airplane's coming of age as an instrument of transport should mean its assumption of the same responsibilities as, for example, the railroad. Other sections, particularly the analysis of the Geneva Convention of June 19, 1948 on the recognition of real rights, or the comments on civil responsibility made during the course of the discussion of the Rome and Brussels conventions, are equally thought-provoking.

Unfortunately this book will undoubtedly not receive the circulation its intrinsic worth justifies. Therefore it is all the more to be urged upon those who do not find the language barrier an insuperable one.

LEONARD N. BECK*

AIR TRANSPORTATION, TRAFFIC AND MANAGEMENT, by Thomas Wolfe, McGraw-Hill Book Co., 1950. 725 p. $6.00.

This long awaited book by a "practical airline man" (the title page lists a number of important airline positions Mr. Wolfe has held), is somewhat of a disappointment. It is more of a hand-book than a text, with its many lengthy tables, its pages of quotations from official publications, its complicated mathematical formulae, its technical charts, its many lists and its lack of analytical and interpretive discussions. It is, however, a valuable addition to the literature of commercial air transportation bringing together, as it does, much material from scattered sources. One might wish, however, that some of this material was a bit more up-to-date but no book in as dynamic a field as air transportation can ever be completely current on publication. It will be valuable as a supplement to the standard texts now available for teaching a general course in air transportation and might serve as the only book used in a course in airline administration and practice. It is in the latter fields that the author proves the worth of his wide practical experience.

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*Aeronautics Division, Library of Congress.

The book is divided into six parts. Part I covers the "framework" of air transportation in the traditional manner but with the inclusion of a chapter on "Geography and Aviation," something not found in other general books in this field. The chapter on "Air Transport of the Armed Forces" seems out of place here as it is concerned with happenings in World War II, with no data later than 1945, and is of only slight interest to the student and of practically no interest to a general reader.

Part II deals with government regulation and airline trade organizations. It is here that the reader will wish for a more interpretive treatment. Policies and regulations in this rapidly growing industry have now become somewhat solidified, so that they might well have been examined by a writer who grew up with them, as Mr. Wolfe has done, and certain predictions might well have been made as to future developments. Part III dealing with the economics of air transportation also lacks interpretation and analysis and it is here that one wishes that figures later than 1946 could have been used. One chapter in this section, however, deserves very favorable mention—that dealing with "Factors Influencing Costs and Revenues." This is the best discussion of such a complicated subject the reviewer has yet seen. Part IV deals with the general organization of airlines in a more complete fashion than is available in other books confirming the opinion that this is really a text on airline administration and practice.

It is in Parts V and VI dealing with technical traffic procedures and sales that the author makes his real contribution. But even here a more interpretive treatment and more up-to-date discussions would have greatly increased the value of the book both for the student and the teacher. (No mention is, for example, made of the air coach service as a means of developing mass air travel). Although there is an aviation dictionary and a list of the abbreviations commonly used in aviation, one seeks in vain for a bibliography.

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